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No. 164

In the

Supreme Court of the United States.

October Term, 1917.

WILLIAM J. ANICKER, - - - - - - *Appellant,*

VERSUS

DAVID GUNSBURG and SOUTHWESTERN PETROLEUM COMPANY, a Corporation, *Appellees.*

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR APPELLANT.

JAMES W. ZEVELY,
JAMES M. GIVENS,
RICHARD W. STOUTZ,
JACOB B. FURRY,
EDWARD C. MOTTER,
Solicitors for Appellant.

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In the

SUPREME COURT OF THE UNITED STATES.

October Term, 1917.

No. . . . .

WILLIAM J. ANICKER, - - - - - - *Appellant,*

vs.

DAVID GUNSBURG and SOUTHWESTERN PETROLEUM COMPANY, a Corporation, *Appellees.*

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF *for* APPELLANT.

Statement of the Case.

This is an appeal from a decree of the Circuit Court of Appeals affirming one of the United States District Court for the Eastern District of Oklahoma dismissing plaintiff's (appellant's) original and amended petitions.

The plaintiff filed a bill in the District Court of Creek County, Oklahoma, against the defendants seeking to have them declared trustees for him of a certain oil and gas mining lease alleged to have been improperly, by error of law, approved by the Secretary of the Interior of the United States, and awarded to them.

The cause was upon defendants' petition removed to the United States District Court because the suit *arose under the laws of the United States* (Rec. 4), *no other ground of removal having been assigned.*

The bill was, without objection, amended. As amended (Rec. 7) it averred among other things, as follows:

> "2. That one Eastman Richard, being then and there a full-blood citizen of the Creek Nation of Indians, and then and there enrolled as such upon the rolls of the United States for the Department of Indian Affairs at Muskogee, Oklahoma,had allotted to him under then existing laws, on the 10th day of March, 1903, the following described property, to-wit:
>
> The NE4 of Section 5, Township 17 North, Range 7 East of the Indian Meridian, in Creek County, Oklahoma.
>
> "And said Eastman Richard duly received a patent therefor and at the time of the happening of the matters hereinafter mentioned was the fee simple owner of said property, but the

control thereof was subject to the restrictions indicated by then existing Acts of Congress for the government of such Indians.

"*3.* That on March 28, 1912, the said Eastman Richard did execute to the plaintiff, William J. Anicker, a certain oil and gas mining lease covering the W2 of the NE4 of said section 5, being a part of the property hereinabove described, a full and true copy of which oil and gas mining lease is attached hereto as 'Exhibit A' and prayed to be taken as part hereof. That said lease to plaintiff, Anicker, was executed in quintuplicate and four parts thereof were by plaintiff filed in the office of the United States Indian Superintendent at Muskogee, Oklahoma, on March 30th, 1912, for approval, and the fifth part filed for record in the office of the register of deeds in and for Creek County, Oklahoma, on April 1, 1912. That at the time of the execution of said lease by said Eastman Richard, to-wit, on March 28, 1912, the plaintiff paid the said Eastman Richard, in cash, the sum of Fifty ($50.00) Dollars and agreed to pay to the cashier of Union Agency at Muskogee for account of said lessor the further sum of Three Hundred Fifty ($350.00) Dollars, the amount of Four Hundred ($400.00) Dollars being the bonus or consideration for said lease then and there agreed on between said Eastman Richard and the plaintiff. That thereafter, being advised by the United States Indian Superintendent that the appraised value of said lease at the time of its date was eight hundred dollars, the plaintiff did deposit with the cashier at Union Agency, at Muskogee,

for account of the lessee, the sum of Seven Hundred Fifty ($750.00) Dollars to make the total amount of said bonus the sum of eight hundred dollars.

"4. That on the 20th day of March, 1912, said Eastman Richard did sign to the defendant, David Gunsburg and Southwestern Petroleum Company, a similar lease covering the same property leased to plaintiff that is to say, the W2 of the NE4 of said section 5, a copy of which lease is hereto annexed as Exhibit 'B.' Said defendants, Gunsburg and the Southwestern Petroleum Co., withheld their lease and refrained from filing the same until April 5, 1912.

"5. By sections 670 and 671 of Mansfield's Digest of the Statutes of Arkansas, extended into the Indian Territory by Act of Congress of February 19, 1903, it is provided:

> '*Sec. 670.* Every deed, bond, or instrument of writing affecting the title in law or equity to any property, real or personal within this state, which is or may be required by law to be acknowledged or proved and recorded, shall be constructive notice to all persons from the time the same is filed for record in the office of the recorder of the proper county; and it shall be the duty of such recorder to indorse, on every such deed, bond, or instrument, the precise time when the same is filed for record in his office.
>
> '*Sec. 671.* No deed, bond, or instrument of writing, for the conveyance of any

real estate, or by which the title thereto may be affected in law or equity, hereafter made or executed, shall be good or valid against a subsequent purchaser of such real estate for a valuable consideration, without actual notice thereof; * * *.'

"By the Act of Congress of April 26, 1906, it is provided as follows:

'*Sec. 20.* That after the approval of this Act all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads, of full-blood allottees of the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribes be in writing and subject to approval by the Secretary of the Interior and shall be absolutely void and of no effect without such approval; *Provided*, that allotments of minors and incompetents may be rented or leased under order of the proper court; *Provided further*, that all leases entered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory.'

"By section 1 of the Act of Congress dated June 16, 1906, and commonly known as the Enabling Act, it is provided as follows:

'That the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and the Indian Territory, as at present described,

may adopt a constitution and become the State of Oklahoma, as hereinafter provided: *Provided*, that nothing contained in the said constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this act had never been passed.'

"By section 2 of the Schedule of the Constitution of the State of Oklahoma it is provided as follows:

> 'All laws in force in the Territory of Oklahoma at the time of the admission of the state into the Union, which are not repugnant to this Constitution, and which are not locally inapplicable, shall be extended to and remain in force in the State of Oklahoma until they expire by their own limitation or are altered or repealed by law.'

"Wherefore, plaintiff is advised, and so charges, that said above quoted provision from Mansfield's Digest is still in force in that part of the State of Oklahoma which was formerly the Indian Territory and applies to this case. If said sections of Mansfield's Digest are not applicable hereto, plaintiff charges that it is pro-

vided by section 1195 of the Compiled Laws of Oklahoma of 1909, as follows:

> '*Sec. 1195. Valid against third persons only when recorded.* * * * Except as hereinafter provided, no acknowledgment of recording shall be necessary to the validity of any deed, mortgage, or contract relating to real estate as between the parties thereto; but no deed, mortgage, contract, bond, lease, or other instrument relating to real estate, other than a lease for a period not exceeding one year and accompanied by actual possession, shall be valid as against third persons unless acknowledged and recorded as herein provided; except actual notice to such third persons shall be equivalent to due acknowledgment and recording.'

"Wherefore, plaintiff charges that the lease so executed by the said Eastman Richard to said defendants, Gunsburg and the Southwestern Petroleum Company, is null and void as against this plaintiff, because the same was not filed in the office of the Register of Deeds for Creek County, Oklahoma, prior to the acquirement of said lease of March 28, 1912, by the plaintiff.

"*6.* By the Act of Congress of March 1, 1907, it is provided as follows (34 Stat. at L., 1026):

> 'The filing heretofore or hereafter of any lease in the office of the United States Indian Agent, Union Agency, Muskogee, Indian Territory, shall be deemed constructive notice.'

"Plaintiff is advised that such filing herein provided for operates as constructive notice only from the time of filing of said lease in the office of the United States Indian Superintendent, and that the same has no effect as notice before the time of such filing.

"Wherefore, plaintiff is advised, and so charges, that said lease to said David Gunsburg and the Southwestern Petroleum Company, though dated anterior to that to the plaintiff, is null and void as against the plaintiff, because the same was not filed until April 5, 1912, after the plaintiff's said lease was filed in the same office.

"Plaintiff is advised and so charges that because he had no notice of the existence of said lease to David Gunsburg and the Southwestern Petroleum Company, the rights of the plaintiff as lessee of said property are prior and superior to the rights of the defendants, Gunsburg and Southwestern Petroleum Company, and should be protected as such. Plaintiff avers that the Secretary of the Interior has found that plaintiff has in all respects complied with all the requirements of law in and about the making of said lease and that said plaintiff is able, capable and willing to perform any and all obligations incumbent upon him as lessee thereunder, as he now offers to do so.

"7. Plaintiff alleges that under the law it was necessary that said leases be submitted to and have the approval of the Secretary of the Interior of the United States; while said leases

were pending before the United States Indian Superintendent for his recommendation as to which should be approved by the Secretary of the Interior a contest arose between said respective lessees as to which of the two leases should be approved.

"Said contest came on for hearing before the United States Indian Superintendent at Muskogee, Oklahoma, to-wit: on May 14, 1912, when testimony was taken and the case argued by counsel and said matter taken under advisement.

"That the United States Indian Superintendent did on the 1st day of July, 1912, make a decision in said contest and advised the approval of the lease to the defendants David Gunsburg and the Southwestern Petroleum Company, and a copy of his recommendation is hereto attached as Exhibit 'C' and prayed to be taken as part thereof.

"8. That thereupon the plaintiff, Anicker, in accordance with the practice of said Department, took an appeal to the Commissioner of Indian Affairs from the recommendation of said United States Indian Superintendent, and said Commissioner of Indian Affairs concurred in the recommendation of the United States Indian Superintendent.

"9. That thereupon said plaintiff, Anicker, took an appeal to the Secretary of the Interior, who after hearing the argument of counsel, rendered a decision on September 24, 1912, a copy of which decision is attached hereto as Exhibit 'D.'

"*10.* That being advised that the decision of the said Secretary of the Interior was erroneous the plaintiff, Anicker, applied for a rehearing before the said Secretary of the Interior, and said rehearing before said Secretary was decided by an opinion dated December 9, 1912, which was received in the office of the United States Indian Superintendent at Muskogee, Oklahoma, December 16, 1912, a true copy of which is attached hereto as Exhibit 'E.'

"*11.* Plaintiff avers that in and by said contest proceedings in the office of the United States Indian Superintendent and in the offices superior thereto including the office of the Secretary of the Interior of the United States, the facts hereinabove stated in numbered paragraphs three and four of this petition were found by said Secretary to be true, but by an error of law as hereinafter stated the said lease to defendants Gunsburg and the Southwesten Petroleum Company was erroneously approved and the lease to the plaintiff Anicker erroneously disapproved.

"*12.* That in and by said decision of the Secretary of the Interior it was determined that plaintiff was a fit lessee and a *bona fide* purchaser of said lease, and said action approving defendant's lease and not approving that to plaintiff was based solely upon the error of law into which the Secretary fell in holding that defendants' lease was entitled to approval because it bore date of March 20, 1912, and the lease of plaintiff bore date of March 28, 1912, notwith-

standing plaintiff's lease was filed in the proper filing and recording offices long prior to the time plaintiff had any notice of the existence of the lease to the defendants. In adjudicating said matter the Department erred in the following particulars.

"*(a)* In declaring that the lease of the defendants Gunsburg and the Southwestern Petroleum Company should be approved because it was first in point of date, and prevailed over the lease to plaintiff, notwithstanding plaintiff's lease was taken in good faith and without notice of defendants' lease and plaintiff's lease was first filed in the office of the United States Indian Superintendent.

"*(b)* In declaring that the lease of the defendants Gunsburg and the Southwestern Petroleum Company should be approved because it was first in point of date and prevailed over the lease to plaintiff, notwithstanding plaintiff's lease was taken in good faith and without notice of defendants' lease and plaintiff's lease was first filed in the office of the Register of Deeds of Creek County.

"*(c)* In construing the following regulation of the Secretary of the Interior:

> 'All leases shall be in quadruplicate and with the papers required shall be filed within thirty days from and after date of execution by the lessor, with the United States Indian Agent at Union Agency, Muskogee, Oklahoma.

to be in effect a permission to lessees to with-

hold their leases for a period of thirty days from the date of their execution during which time subsequent lessees in good faith may not acquire any superior right, thereby making such regulation conflict with and override the laws of Congress which declare that the filing of any lease in the office of the United States Indian Superintendent shall be constructive notice.

"*(d)* In construing the following regulation of the Secretary of the Interior:

> 'All leases shall be in quadruplicate and with the papers required shall be filed within thirty days from and after date of execution by the lessor, with the United States Indian Agent at Union Agency, Muskogee, Oklahoma,'

to be in effect a permission to lessees to withhold their leases for a period of thirty days from the date of their execution during which time subsequent lessees in good faith may not acquire any superior right, thereby making such regulation conflict with and override the laws of Congress which declare that such leases shall be void as against subsequent leases until filed for record in the office of the register of deeds for the county where the land is situate.

"*(e)* In holding that the time of filing the lease in the office of the United States Indian Superintendent is not material if done within thirty days.

"*(f)* In holding that the fact, and the time, of filing of the lease in the office of the register

of the county wherein the land is situated is not material at all.

"*(g)* By holding, in effect, that defendants Gunsburg and the Southwestern Petroleum Company are entitled to thirty days after the taking of their lease to file the same in the office of the United States Indian Superintendent, during which thirty days plaintiff can not acquire *bona fide* rights that will prevail over those of defendants, notwithstanding the plaintiff was an innocent purchaser of his lease for value and was diligent in filing his lease promptly in the office of the said United States Indian Superintendent before defendants filed their lease therein.

"*(h)* By holding, in effect, that defendants, Gunsburg and the Southwestern Petroleum Company, are entitled to thirty days after the taking of their lease to file the same in the office of the register of deeds, during which thirty days plaintiff can not acquire *bona fide* rights that will prevail over those of defendants, notwithstanding the plaintiff was an innocent purchaser of his lease for value and was diligent in filing his lease promptly in the office of the register of deeds for Creek County, Oklahoma, before defendants filed their lease therein.

"*(i)* In failing to approve Anicker's lease upon the facts found by the Secretary and in approving the lease to the defendants."

Paragraphs 13 and 14 of the bill set out allegations that the defendants are in possession of the

leased land and are extracting large quantities of oil therefrom and disposing of same and the proceeds thereof, aptly showing the necessity for a receiver to be appointed.

Paragraph 15 is as follows:

> "*15.* Plaintiff attaches hereto the following papers which are the following exhibits: Exhibit A One being the application for approval of the Anicker lease, Exhibit A Two being the affidavit of Indian lessor and the affidavit of lessee, Exhibit A Three being the bond of the plaintiff Anicker. Also Exhibit B One being the application for the approval of the lease to David Gunsburg and the Southwestern Petroleum Company, Exhibit B Two being the affidavit of lessor and affidavit of one Roy Scales on behalf of the lessee, Exhibit B Three being the bond by said last named lessees with certificate of qualification of the Surety Company attached thereto, and Exhibit B Four being the evidence showing the authority of officers to execute bonds and accompanying papers. Plaintiff also attaches hereto as Exhibit F the written opinion of the Commissioner of Indian Affairs addressed to the Secretary of the Interior under date of August 6th, 1912. Also Exhibit G being the letter of the Commissioner of Indian Affairs to the Secretary of the Interior dated August 19, 1912, transmitting the said leases to the Secretary of the Interior." (Rec. 15-16.)

The prayer for relief was as follows:

"Plaintiff prays that upon the hearing of this cause this Honorable Court will declare that the approval of the lease to the defendants Gunsburg and the Southwestern Petroleum Company was improper and made under a mistake of law and that the said lease to the plaintiff stands approved and that the defendants Gunsburg and the Southwestern Petroleum Company hold said lease so approved to them as trustees for the sole use and benefit of this plaintiff; that an accounting be taken of all the oil extracted from said leased land before the filing of this suit, and also after the filing of this suit until possession of said property be delivered to plaintiff and that plaintiff have personal judgment against said defendants, Gunsburg and the Southwestern Petroleum Company *in solido* for the amount of the value of said oil so ascertained; that the plaintiff may be put in possession of said property and the defendants and each of them enjoined from interference with the possession of the plaintiff therein; that pending the determination of this cause Your Honor will appoint a suitable receiver or receivers to take possession of said property and all oil, and the proceeds of all oil taken from said land, wherever the same may be found, and that said receiver may be authorized and directed to operate said lease and to extract and dispose of said oil and to hold the proceeds subject to the orders and decrees of this Honorable Court."

To the bill were attached these documents:

(a) Exhibit "A" was the lease executed on March 28, 1912, by the Indian, Eastman Richard to plaintiff (Rec. 17-23). It was upon regular departmental form and recites a consideration of one dollar bonus and "the royalties, covenants, stipulations and conditions hereinafter contained" and demises and leases unto said Anicker "for the term of ten years from the date of the approval hereof by the Secretary of the Interior and as much longer thereafter as oil or gas is found in paying quantities, all the oil deposits and natural gas in or under the following described tract of land lying and being within the County of Creek and State of Oklahoma, to-wit: the West Half of the Northeast Quarter (W½ of NE¼) 81.18 acres, of Section 5, Township 17 North, Range 7 East, of the Indian Meridian;" it further provides for a royalty of 12½% of the gross proceeds of all crude oil extracted from the land and $300 per annum on each gas producing well, and for a stipulated annual advance royalty to be paid into the Indian office for the Indian until a producing well is completed on said premises; it contains numerous other clauses not necessary to be especially noticed; it was executed by the Indian with all formalities required by law and the regulations of the Indian office, including two witnesses to each signature and the acknowledgment by the Indian before a notary

public on March 28, 1912 (Rec. 22-3); it carries the endorsement on the bottom "advance royalty received $12.00" (Rec. 23); it was on printed form prepared and furnished by the Indian Department having blanks at the bottom on last page for the United States Indian Superintendent and Commissioner of Indian Affairs to endorse their recommendations as to approval or disapproval; it bears on it the endorsement "Filed for record this 30th day of Mar., 1912, at 1 o'clock P. M. Dana H. Kelsey, Supt. Union Agency by R. W. Fields, ac." (Rec. 23.)

(b) Exhibits "A 1" and "A 2" and "A 3" (Rec. 23-28) filed in the Union Agency, March 30, 1912, were respectively the formal "Application for Approval of Oil and Gas Mining Lease" and the "Affidavits of Indian Lessor and Lessee, Proof of Bonus and No Development" and "Bond," all upon forms provided by the department and all duly executed and approved. No question was made below as to their execution or text, so it is not necessary to here set them out fully.

The sworn affidavit of the Indian sets out the following statements by him:

> "I, Eastman Richard, of Pierce, Oklahoma, being first duly sworn according to law, state upon oath that I am more than 41 years of age, and that under date of March 28th, 1912, I made an Oil and Gas Mining Lease with William J.

Anicker, covering 80 acres; that said lease was read over and fully explained to me at the time that I signed same, and I understand the nature, contents, and effect thereof; that I made said lease in good faith for the purposes therein specified and now join in the application of the lessee for its approval by the Secretary of the Interior.

"I further swear that, other than the terms of the lease described, the only contract, agreement, or understanding between myself and the lessee covering additional payments made or to be made as bonus money, or any other consideration, is as follows:

"Four Hundred and No/100 Dollars ($400.00) as bonus, of which amount I acknowledge the receipt of $50.00, the balance, if any, payable when lease is approved." (Rec. 26.)

(c) Exhibit "B" (Rec. 29-35) is the lease from the Indian to the defendants. *It is of exactly the same tenor and terms as the lease to plaintiff*, covers the same land, and, though dated March 20, 1912, *eight days prior to the date of the Anicker lease, was not filed in the Union Agency until April 5, 1912, seven days after the filing of the Anicker lease.* (Rec. 35.) It has attached thereto the usual application for approval, affidavits and bond upon the same forms that accompanied the plaintiff's lease (Rec. 35-42) and the penalty of the bond was $1500, *exactly the same amount as the bond furnished by plaintiff.*

The affidavit of lessor and lessee showed that the

bonus paid by defendants Gunsburg and Southwestern Petroleum Company to the Indian *was Twenty Dollars paid to the Indian as against Four Hundred Dollars paid by Anicker for his lease.*

(d) Exhibit "C" is the opinion of the United States Indian Superintendent (Rec. 42-51) wherein he recommends the disapproval of plaintiff's lease and the approval of that of defendants'. This recommendation was concurred in by the Commissioner of Indian Affairs on August 6, 1912 (Exhibit "F", Rec. 54-56), by a letter to the Secretary of the Interior.

(e) Exhibit "D" (Rec. 51-53) is the decision of the Assistant Secretary of the Interior, September 24, 1912, in harmony with said recommendations.

(f) Exhibit "E" is the opinion by the Secretary of December 10, 1912, upon rehearing. (Rec. 53-54.)

(g) Exhibit "H" (Rec. 58) is a letter dated November 25, 1912, showing that after the first decision by the Secretary and before his decision on the application for reconsideration, plaintiff gave notice to defendants of his intention to file this bill in equity to have defendants declared trustees of the lease in contest for his benefit, if his contention be not sustained by the Secretary.

The text and substance of the opinions and de-

cisions of the several officers mentioned will be hereinafter more fully stated and commented on.

The defendants filed their petition and bond to have the cause removed from the state to the United States Court, *not* upon diversity of citizenship but upon the sole ground that:

> "Your petitioners aver that this suit is a suit of a civil nature in equity, of which the District Court of the United States has original jurisdiction, arising under the Constitution and under the laws of the United States, as appears from the face of plaintiff's said petition, and petitioners aver and state that the plaintiff's said petition shows that the suit arises under the laws of the United States, and involves, as appears from the face of the said petition, the construction and application of the following laws of the United States, to-wit:" (Rec. 4.)

Here follow references to the several statutes referred to.

The petition for removal avers the nature of the controversy to be:

> "*First.* That on the 17th day of January, 1913, the above named plaintiff filed a petition in the District Court for the Twenty-second Judicial District of the State of Oklahoma for Creek County, praying for a judgment against defendants, David Gunsburg and Southwestern Petroleum Company; that the approval of the

Secretary of the Interior of a certain oil and gas mining lease executed to defendants by Eastman Richard, a citizen of the Creek Tribe of Indians, be declared to be improper, and made under a mistake of law, and that an oil and gas mining lease executed to plaintiff by said Eastman Richard stand approved, and that the defendants hold their said lease, approved by the Secretary of the Interior as trustee for the sole use and benefit of the plaintiff'." (Rec. 4.)

The defendant filed an answer (Rec. 58) to the amended bill in nine numbered paragraphs or defenses. Plaintiff filed (Rec. 68) a motion or set of motions to strike out various parts thereof. To avoid repetition and for clearness in reading the answer with understanding, there are now set out first the grounds of said motions (all having the same grounds) and then the answer with notation in brackets of the parts covered by each motion. Said motions are initialed "A" to "K", inclusive. The grounds of said motions to strike parts of the answer were:

"*1.* Because said matter is impertinent to the issue.

"*2.* Because said matter is not responsive to any issue tendered by the bill.

"*3.* Because the bill of complaint presents a simple question of law in this case for this court to determine whether the decision of the Secretary of the Interior in said law question was

right or wrong and defendants, by said matter sought to be excluded, seek improperly to inject issues of fact into this case which have been concluded by the decisions of the Secretary of the Interior, which decisions are pleaded by the bill of complaint and are admitted in the answer of the defendants.

"*4.* Because said matter does not present any proper defense to the amended bill.

"*5.* Because said matter is merely a legal argument and not a proper matter of defensive allegation.

"*6.* Because the same states no issues in the matter that ought in law to defeat plaintiff's action.

"*7.* Because defendants caused removal of this cause to this court upon the grounds that the decision of this cause depended upon a federal question of law and they ought not now to be permitted to inject into this case questions of fact in the attempt to have the case decided upon said questions of fact without deciding said questions of law upon which the jurisdiction of this court was invoked by the defendants." (Rec. 70.)

The answer (Rec. 59, *et seq.)* was:

First Paragraph.

"Defendants admit the age and residence of the plaintiff, and the defendant Gunsburg, and the domicile of the defendant corporation; admit that Eastman Richard is a full-blood citizen of

the Creek Nation of Indians, and duly enrolled as such, as alleged; admit that there was allotted to said Eastman Richard, the land described in the petition, and that patents were duly executed and delivered to him, vesting in him his fee simple title in and to the alleged allotment, and that he was the owner in fee thereof at the time of, and prior to, the execution of the various leases for oil and gas mining purposes mentioned in plaintiff's petition; admit that said Eastman Richard did, on the 28th day of March, 1912, execute to plaintiff, on the departmental form, said oil and gas mining lease covering the

> West Half (W½) of the Northeast Quarter (NE¼) of section five (5),

same being a part of his said allotment; admit that a true copy of said oil and gas mining lease is shown by Exhibit A, but in this connection, defendants say that said copy shown by Exhibit A does not bear the various endorsements made thereon by the Superintendent of the Indian Agency, at Muskogee, Oklahoma, the Commissioner of Indian Affairs, and the Secretary of the Interior showing the action of the Secretary of the Interior on said lease; admit that plaintiff, Anicker, filed the said lease, executed to him by Eastman Richard, in the office of the United States Indian Superintendent at Muskogee, on March 30th, 1912; deny that said lease executed to the plaintiff by Eastman Richard was filed for record in the office of the Register of Deeds in and for Creek County, on April 1st, 1912, and in this connection state that the plaintiff, under the rules and regulations of the Secretary of the

Interior applicable thereto, was required to obtain the execution of said lease in quadruplicate parts—that is, the rules and regulations prescribed by the Secretary of the Interior, and then in force, provided: 'All leases shall be in quadruplicate, and, with the papers required, shall be filed within thirty days from and after the date of the execution by the lessor with the United States Indian Agent, at Union Agency, Muskogee, Oklahoma,' and plaintiff, in complying with the rules of the Secretary of the Interior did obtain the execution of said lease from Eastman Richard in quadruplicate parts, and filed all four of said quadruplicate parts in the office of the United States Indian Superintendent at Muskogee, Oklahoma, on March 30th, 1912, but defendants deny that said quadruplicate parts, or either of them, was filed for record in the office of the Register of Deeds for Creek County on April 1st, 1912, or at any other time, but states that plaintiff did file in the office of the Register of Deeds of Creek County, on or about April 1st, 1912, a fifth copy of said lease executed by Eastman Richard, but never filed said fifth copy or fifth part thus executed by Eastman Richard, in the office of the said United States Indian Superintendent, or presented same to the Secretary of the Interior for his approval or disapproval; admit that plaintiff paid to Eastman Richard on March 28th, at the time said lease was executed, the sum of Fifty Dollars ($50.00) in cash; admit that plaintiff agreed to pay Eastman Richard, the lessor, upon approval of the lease by the Secretary, an additional sum of

Three Hundred Fifty ($350) Dollars, as a further bonus for said lease, making the entire bonus Four Hundred ($400) Dollars; admit that plaintiff did thereafterwards, deposit with the cashier at Union Agency, Muskogee, Oklahoma, the sum of Seven Hundred Fifty ($750) Dollars, Three Hundred Fifty ($350) Dollars of which amount was the balance of the agreed bonus stipulated for between plaintiff and lessor at the time the lease was executed on March 28th, 1912, and the remaining Four Hundred ($400) Dollars being the increased bid of the plaintiff, under the suggestions of the United States Indian Superintendent that the bonus of Four Hundred ($400) Dollars agreed upon between plaintiff and the lessor was inadequate."

(Following bracketed part covered by Motion A:)

"[And in this connection, defendants aver and plead that the Fifty ($50) Dollars paid by the plaintiff to the lessor at the time the lease was executed to him on March 28th, 1912, and agreement to pay Three Hundred Fifty ($350) Dollars more into the hands of the cashier in the office of the Indian Superintendent at Muskogee, was wholly and entirely inadequate and considered inadequate by the United States Superintendent of Indian Agents, at Muskogee, and, likewise, considered by the Secretary of the Interior as entirely inadequate, but, in order to give the plaintiff an opportunity to be heard in support of his application for the approval of his lease, Honorable Dana H. Kelsey, United States Indian Superintendent at Muskogee did, on May

18th, 1912, with great fairness to the plaintiff, address to the plaintiff a registered letter, which the plaintiff received in due course of mail, in which letter said Indian Superintendent notified the plaintiff 'that the oil inspector has submitted a report in connection with the case, advising that in his opinion the bonus of Fifty Dollars paid upon the execution of the lease was inadequate, and that an adequate bonus at that time was Eight Hundred Dollars. Remittance in the sum of Seven Hundred Fifty Dollars additional bonus for the lease should, therefore, be made within the time above specified. If you fail to make the above remittance, or respond to this letter within the time above designated, it will be presumed that you refuse to pay the amount of bonus considered adequate by this office and have nothing further to submit in connection with the case, and the opinion of this office with respect to these leases will then be rendered as the facts in the case seem to warrant;' defendants aver that the time referred to in the said letter for the deposit of the additional bonus of Seven Hundred Fifty ($750.00) Dollars was ten (10) days from the date of the receipt of the notice by plaintiff; plaintiff thereafterwards deposited, along about the 1st day of June, 1912, said sum of Seven Hundred Fifty ($750.00) Dollars in the office of the United States Indian Superintendent, but defendants aver and plead that said Indian Superintendent did not require plaintiff to deposit said Seven Hundred Fifty ($750.00) Dollars, but merely suggested the deposit of said amount as an additional offer upon

plaintiff's part, and defendants aver and plead that neither the Superintendent of the Indian Agency, nor the Secretary of the Interior did anything, or took any steps that committed the Interior Department, or the Secretary, to the endorsement or approval of plaintiff's lease, and defendants aver and plead that it was fully understood by the plaintiff that the deposit of the said Seven Hundred Fifty ($750.00) Dollars additional did not confer upon him any right to claim anything greater or more than he would have had if he had originally paid the lessor a cash bonus of Eight Hundred ($800.00) Dollars, and the plaintiff did not understand that the said deposit, in any way, estopped the Secretary of the Interior to disapprove his lease.]

"Defendants admit that on the 20th day of March, 1912, Eastman Richard did execute to them, a similar oil and gas mining lease covering the same eighty (80) acres of land, said lease being on the form prescribed by the Secretary of the Interior, and they admit that they did not file their said lease in the office of the United States Indian Superintendent, at Union Agency, Muskogee, until April 5th, 1912, and admit that they did not file their lease for record in the office of the Register of Deeds for Creek County, the county in which the land is situated, until after the plaintiff obtained his lease on the 28th day of March, 1912.

"Defendants deny that any of the sections of Mansfield's Digest of the Laws of Arkansas were in force in the State of Oklahoma during

the year, 1912, or in anywise applicable to the facts in this case.

"Defendants deny that the lease executed to them by Eastman Richard on March 20th, 1912, and referred to in plaintiff's amended petition, is or was null and void as against the plaintiff, for any reason, and especially deny that it was ineffectual against the plaintiff on account of it not having been filed in the office of the United States Indian Superintendent at Muskogee prior to March 28th, 1912, or on that date, and deny that the validity of their lease as against plaintiff was in any way affected by their failure to file their lease in the office of said Indian Superintendent prior to April 5th, 1912, or place their lease of record in the office of the Register of Deeds of Creek County, Oklahoma, at any time."

(Following bracketed part covered by Motion B:)

"[Defendants specifically deny that the plaintiff had no notice of the existence of their said lease executed to them by Eastman Richard on March 20th, 1912, and referred to in plaintiff's amended petition at the time plaintiff obtained his lease thereafterwards on March 28th, 1912, from the same lessor, and deny that plaintiff had no notice of the existence of their lease at the time he paid the Fifty ($50.00) Dollars to Eastman Richard, the lessor, on March 28th, 1912, and deny that plaintiff had no notice of the existence of their lease at the time the plaintiff deposited the said Seven Hundred Fifty ($750.00) Dollars as additional bonus offer at

the office of the said United States Indian Superintendent along in the month of June, 1912.]

"And defendants deny that the Secretary of the Interior found, as a fact, that the plaintiff had, in all respects complied with the requirements of law in and about the making of the lease relied upon by the plaintiff, and they deny that the Secretary of the Interior found that the plaintiff was or is able, capable and willing to perform any and all the obligations incumbent upon him as such lessee thereunder.

"Defendants admit that under the law it was necessary to submit both the leases executed by Eastman Richard, to the Secretary of the Interior for his approval,"

(Following bracketed part covered by Motion C:)

"[and they admit that said leases were invalid without the approval of the Secretary,]

"and defendants admit that while said leases were pending before the Indian Superintendent at Muskogee, and before the Secretary of the Interior for his approval or disapproval, a contest arose between the plaintiff and these defendants as to which of the two leases should be approved, and they admit that hearings were had before the United States Indian Superintendent at Muskogee in the month of May, 1912, and that the testimony of witnesses was heard, and the case argued by counsel, and the matter taken under advisement by the Indian Superintendent; they admit that the United States Indian Superintendent did, on the 1st day of July, 1912,

render a written decision in said contest, whereby he held and advised that the defendants' lease be approved and that the plaintiff's lease be disapproved, and they admit that the contest proceeded from the office of the Indian Superintendent to the Commissioner of Indian Affairs, and that the Commissioner of Indian Affairs concurred in the recommendations of the United States Indian Superintendent, and they admit that the contest proceeded from the Commissioner of Indian Affairs to the Secretary of the Interior, and that the Secretary of the Interior rendered a written opinion on September 24th, 1912, concurring in the recommendations of the United States Indian Superintendent and the Commissioner of Indian Affairs, and did, upon that date, disapprove the plaintiff's lease and approve defendants' lease; and they admit that plaintiff applied for a rehearing before the Secretary of the Interior, and that upon said rehearing the Secretary handed down a written opinion on or about December 9th, 1912, overruling the petition to rehear, and reaffirming his action taken theretofore in disapproving the plaintiff's lease and approving defendants' lease.

"Defendants deny that the Secretary of the Interior committed any error of law in approving defendants' lease and disapproving plaintiff's lease, and deny that the Secretary of the Interior would have approved the plaintiff's lease except for an error of law. Defendants deny that the Secretary of the Interior found as a fact, or determined that the plaintiff was a fit

person to be the lessee of said land, and deny that the Secretary found that the plaintiff was a *bona fide* purchaser of the lease executed to him on March 28th, 1912, and deny that the Secretary's action in approving defendants' lease and disapproving plaintiff's lease was based solely upon any error of law, and deny that the Secretary approved the defendants' lease and disapproved the plaintiff's lease solely for the reason that the defendant's lease was prior in date to the plaintiff's lease, and deny that the Secretary of the Interior found that at the time the plaintiff obtained his lease on March 28th, 1912, plaintiff had no notice of the existence of the defendants' lease, and defendants deny that the Secretary, or any of the officials in the Department, through whose hands this contest case passed, held as a matter of law that the recording laws made Anicker an innocent purchaser, or that the fact that Anicker recorded his lease in the county in which the land is situated, and filed his lease in the office of the United States Indian Superintendent, prior to the date defendants filed their lease in the office of the United States Indian Superintendent, constituted the plaintiff a *bona fide* purchaser, or in any way affected or controlled the discretion of the Secretary in approving or disapproving which ever lease he saw fit.

"Defendants join issue and deny all the assignments of error set forth in plaintiff's amended petition under the letters a, b, c, d, e, f, g, h and i."

(Following bracketed part covered by Motion D:)

["And in this connection defendants aver and plead that during the contest between the plaintiff and the defendants before the Secretary of the Interior as to which lease should be approved, the plaintiff and the defendants introduced evidence and witnesses who testified before the United States Indian Superintendent, which testimony was transcribed and sent by the United States Indian Superintendent to the Commissioner of Indian Affairs, and by the latter submitted to the Secretary of the Interior, and defendants aver and plead that the record before the Secretary of the Interior failed to show that the plaintiff, Anicker, was an innocent purchaser of his lease on March 28th, 1912, and failed to show that plaintiff, at the time he obtained his lease from Eastman Richard on March 28th, 1912, and paid the Fifty ($50) Dollars, part consideration therefor, had no notice that prior thereto the defendants had obtained a like departmental lease on this same (80) acres of land."]

Second Paragraph.

(Following bracketed part covered by Motion E:)

["For further defense in their behalf, defendants aver and plead that the testimony and evidence submitted by the respective contestants in the proceeding had before the United States Indian Superintendent at Muskogee, the Commissioner of Indian Affairs, and the Secretary of the Interior, showed that Roy Scales was the

agent of the defendants during the month of March, 1912; that as their agent he negotiated and obtained the oil and gas mining lease from Eastman Richard to the defendants on March 20th, 1912; that one Robert Fish was the agent of the plaintiff, Anicker, and as such agent, aided and assisted Anicker in obtaining his lease on March 28th, 1912; that Eastman Richard, prior to the execution by him of the lease to Anicker on March 28th, 1912, told and informed both Anicker and Robert Fish that he, Eastman Richard, had, prior thereto executed an oil and gas mining lease upon the same land to Roy Scales, and defendants therefore aver and plead that the record before the Department of the Interior in said contest affirmatively showed that plaintiff was not a *bona fide* purchaser of the lease relied upon by him in this case, but purchased said lease with notice of facts sufficient to put him upon inquiry and charge him with implied actual notice of the defendants' lease, and defendants state that at no time during said proceedings, as shown by the record before the Department of the Interior, was it admitted that the plaintiff was a *bona fide* purchaser, or found as a fact by the Indian Superintendent, or the Commissioner of Indian Affairs, or the Secretary of the Interior, that plaintiff, Anicker was a *bona fide* purchaser of said lease on March 28th, 1912, for a valuable consideration, and without notice of the prior lease executed to these defendants."]

Third Paragraph.

(Following bracketed part covered by Motion F:)

[''Defendants for further defense in their behalf aver and plead that at no place did the Secretary of the Interior limit, or undertake to limit, his power and jurisdiction over the leases, and his right to approve or disapprove the plaintiff's lease to the single question of the priority of the respective contesting lessees, but upon the the other hand, the Assistant Secretary of the Interior in passing on this matter said: 'If there is any advantage in the prior filing of a lease, both having been filed at the agency within the time required by the regulations, Anicker would have that advantage. The act of March 1, 1907 (Stat. L. 34, 1036), makes the filing at Union Agency legal notice. Anicker's lease is stamped as filed at the Agency March 30, 1912. Until approved by the Secretary it was not a completed instrument, and the fact of its having been recorded in a county office cannot estop the Secretary from finding that another lease regularly executed and filed is more for the allottee's interest and better entitled to approval. The motion to reconsider will not be entertained'.''']

Fourth Paragraph.

(Following bracketed part covered by Motion G:)

[For further defense in their behalf, defendants say that the plaintiff's petition, or bill, as a matter of law, fails to state sufficient facts to constitute a cause of action, and shows on its face that the plaintiff cannot complain of any of

the matters and facts therein set forth, nor raise any of the points of law, or questions of fact set forth therein, it appearing that the lease under which plaintiff claims has been disapproved by the Secretary of the Interior. And defendants aver and plead that the United States Indian Superintendent was authorized and directed by the rules prescribed by the Secretary of the Interior to investigate and report to him whether or not the bonus offered by lessees was adequate, and, acting under his authority, the said Indian Superintendent did investigate the adequacy of the bonus of Four Hundred ($400) Dollars offered by plaintiff, and found and reported it as totally inadequate, and as a consequence thereof, defendants aver that plaintiff's status and standing before the Interior Department and the Secretary of the Interior was not at any time prior to April 5th, 1912 (the date defendants filed their lease in the office of the United States Indian Superintendent), such as to justify or warrant the approval of his said lease by the Secretary, and defendants aver and plead that plaintiff's lease should have been disapproved, independent of all consideration of their (defendants') lease."]

Fifth Paragraph.

(Following bracketed part covered by Motion H:)

["For further defense in their behalf, defendants say that the plaintiff's petition, or bill, as a matter of law, does not present or tender any justiceable issue."]

Sixth Paragraph.

(Following bracketed part covered by Motion I:)

["Defendants for further defense in their behalf, aver and plead that the lease relied upon by plaintiff, and shown by Exhibit A to the petition, or bill, expressly provides that:

'This indenture of lease made and entered into in quadruplicate on this 28th day of March, 1912, by and between Eastman Richard of Pierce, Oklahoma, enrolled as a full-blood citizen of the Creek Nation, Roll No. 7664, party of the first part, hereinafter designated as lessor, and William J. Anicker of Muskogee, Oklahoma, party of the second part, hereinafter designated as lessee, under and in pursuance of the provisions of the Act of Congress approved May 27, 1908.'

"And, further, said lease provides that the lessor 'does hereby demise, grant, lease and let unto the lessee, for the term of ten years from the date of the approval hereof by the Secretary of the Interior,' and said lease further provides, as shown by section eight thereof, as follows:

'This lease shall be subject to the regulations of the Secretary of the Interior, now or hereafter in force, relative to such leases, all of which regulations are made a part and condition of this lease: *Provided, however*, that no regulations made after the approval of this lease, affecting either the length of term of oil and gas leases, the rates of royalty or payment thereunder, or the assign-

ment of leases, shall operate to affect the terms and conditions of this lease.'

"And defendants therefore aver and plead as a matter of law, that the petition or bill of the plaintiff in this cause considered in connection with Exhibit A thereto, being a copy of his alleged lease, shows that the courts have no jurisdiction to consider or adjudge any of the matters set forth in plaintiff's petition or bill, and cannot review, set aside, reverse, vacate, amend or annul the action of the Secretary of the Interior in approving the defendants' lease in this cause, and have no jurisdiction to approve the plaintiff's lease, or direct and compel the Secretary of the Interior to approve or consider again, the plaintiff's lease."]

Seventh Paragraph.

(Following bracketed part covered by Motion J:)

["Defendants aver and plead, as a matter of law, that the Secretary of the Interior had sole, exclusive and final jurisdiction to decide, which of the conflicting leases, that is the plaintiff's or defendants', should be approved, and in the exercise of his jurisdiction, the Secretary of the Interior was clothed with absolute and final discretion, and having exercised that discretion, and approved the defendants' lease, there is no appeal to the courts, either in law or equity, and the defendants aver and plead that the Secretary of the Interior has heard all the evidence offered by the parties in the contest in his department, and after having heard all the evidence and the

argument of counsel, and considered plaintiff's lease, and the defendants' lease, his action on the matter was final, and conclusive on all parties, and not reviewable by a court of equity or law."]

Motion K was sustained (Rec. 126) striking out the eighth paragraph or defense and need not be further noticed.

Motions A to J, inclusive (Rec. 68-76) were overruled (Rec. 126-7) and this ruling forms the subject-matter of the first numbered assignment of error.

As the pleadings thus stood the only issue in the case was one of law, as the amended bill presented it; that is to say, the only question for decision was whether, upon the facts and record before the department, it committed *an error of law* in approving the lease to defendants instead of that to the plaintiff.

The defendants thereupon moved for leave to further amend their answer (Rec. 76, *et seq.*) in which *they sought to attack the decision of the Secretary of the Interior as based on a gross mistake of fact*, and to incorporate in their answer a large amount of evidence, oral and documentary, from the case as it went before the department.

This amendment reads:

"AMENDMENT TO ANSWER OF DEFENDANTS TO PLAINTIFF'S AMENDED BILL.

Come now the defendants, and show the court that about three o'clock P. M. Monday, September 29th, 1913, plaintiff's counsel served on their counsel a copy of a proposed amended petition in this case; that this case, after several postponements, none of which delay was at the request of themselves, or their counsel, had been previously thereto set for trial on the merits on Tuesday, September 30th, 1913; that being extremely anxious to have this case heard and disposed of in this court, their counsel immediately upon receiving copy of the proposed amended petition or bill dictated the answer to said amended petition filed by them on September 30th, 1913; that in view of shape plaintiff has now by his amended petition sought to mould the issues it is important and material to their defense and rights that they be allowed to add the following by way of amendment to their said answer to plaintiff's amended petition filed in this case on September 30th, 1913, so as to aver and plead the following, to-wit:

'And defendants aver and plead that the conceded facts established without dispute by the evidence before the Department of the Interior in said contest showed that the plaintiff, Anicker, did not purchase the lease under which he claims from Eastman Richard on March 28th, 1912, and pay the Fifty ($50) Dollars cash consideration

therefor, without actual notice and implied actual notice of the defendants' prior lease, and the defendants aver and plead that the undisputed evidence before the Department of the Interior in said contest showed that the bonus offered by the plaintiff, to-wit, Four Hundred ($400) Dollars, Fifty ($50) Dollars of which was paid in cash, for the lease, was wholly inadequate, and that the Secretary of the Interior would not have and should not have approved his lease for such inadequate cash bonus, and defendants aver and plead that any finding of fact by the officers of the Department of the Interior and the Secretary of the Interior to the effect that the plaintiff was a *bona fide* purchaser of his lease or that the plaintiff at the time he purchased his lease on March 28th, 1912, and paid the Fifty ($50.00) Dollars therefor, had no notice of the prior lease to these defendants, was a gross mistake of fact, and that by a gross mistake of law the Secretary of the Interior and the officers in his Department through whose official hands the contest proceeded, fell into a misapprehension of the facts proved before them, and defendants aver and plead that the undisputed evidence submitted to the Department in said contest showed that the plaintiff, on March 28th, 1912, at the time he took said lease and paid Fifty ($50.00) Dollars cash therefor, had actual notice of defendants' prior lease; and the defendants in support of the defenses set up in this an-

swer, especially the defenses set up in paragraph two and paragraph four, herewith filed, as Exhibit A to this answer, a complete transcript of the record in said contest before the Department of the Interior, including the testimony of the witnesses, all the evidence, the written arguments of counsel, the reports, findings and opinions of the United States Indian Superintendent at Muskogee, Commissioner of Indian Affairs, and the Secretary of the Interior, and defendants herewith make said certified copy of the record before the Department in said contest Exhibit A to this answer, and as a part hereof.'

Wherefore, defendants move the court to allow the above amendment to their said answer." (Rec. 76-78.)

The mass of matter thus sought to be injected into the *pleadings* of this case was shortened by stipulation of parties, reserving legal objections to the propriety of the amendment and the admissibility in this case of said matter, which will be hereinafter more fully stated.

Plaintiff filed these written objections (Rec. 123-4) to the amendment so offered:

"OBJECTIONS TO DEFENDANTS' AMENDMENT TO THEIR ANSWER.

"Plaintiff objects to defendants' amendment to its defense which has said Exhibit 'A' attached thereto, on the following grounds:

"1. Because said defense does not state the particular mistake in the finding of fact alleged to have been made by the Secretary of the Interior and the way said mistake occurred.

"2. Because it does not appear from said defense that by fraud or imposition of the plaintiff here the Secretary of the Interior prevented the defendants here from fully presenting their case or prevented the officers from fully considering it.

"3. Because it does not appear from said defense that the defendants were in any manner precluded from drawing said alleged mistake to the attention of the Secretary of the Interior while said matter was pending before him.

"4. Because it does not appear from said defense that the defendants have availed themselves of every remedy for the correction of said alleged error before the Interior Department by motion for review or motion to correct said alleged error or by in any manner calling the attention of the Secretary of the Interior to said alleged error while said matter was pending before him, with a view to having the same corrected.

"5. Because it appears from said defense and the record filed therewith as an exhibit that the defendants are estopped to set up said alleged mistake of fact because they failed to seek the correction of the same while said matter was pending in the Interior Department.

"6. Because it appears from said defense and the record filed therewith as an exhibit that

the defendants have accepted the benefits of said decision of the Secretary of the Interior which was in their favor, wherefore they are estopped to attack said decision by claiming that it was based wholly or in part upon a gross mistake of facts

"7. Because it appears that said decision now claimed to be based upon a gross mistake of facts in part is in force and effect and that the same was never complained of in the Interior Department by the defendants so that the said facts found therein are *res adjudicata* as against the defendants.

"8. Because it appears from the original bill or petition in this case that the controversy is solely one over a federal question of law, and that the defendants have petitioned to remove this case from the state court to this court upon said federal question of law and they are now estopped to attempt to set up a controversy over facts the decision of which in their favor would oust the jurisdiction of this court invoked by them.

"9. Because said matter is not responsive to any issue tendered by the bill."

The court over plaintiff's exceptions overruled the objection and permitted the amendment in order to let it be incorporated into the record (Rec. 126-7). The second and third assignments of error present the error thus committed.

Plaintiff thereupon made a motion to strike defendants' last amendment to their defense. (Rec. 124-

5) which assigned the same grounds as were assigned to the objections to the amendment. This motion, which tested the sufficiency of the defenses, was overruled by the court (Rec. 126-7) and the error committed thereby is presented by the third assignment of error.

Thereupon further proceedings were had as thus recited (Rec. 127-128) in the final decree.

"FINAL DECREE.

"This cause came on for final hearing on this October 11th, 1913, the same being a regular day of the October, 1913, term of this court at Ardmore, Honorable RALPH E. CAMPBELL, regular judge, presiding, upon the merits, whereupon counsel for plaintiff stated that in view of the court's previous rulings on plaintiff's motions to strike portions of defendants' answer to plaintiff's amended bill and Exhibit 'A' attached to the amendment to defendants' answer to plaintiff's amended bill, and on plaintiff's objections to the filing of the amendment by defendants to their answer to plaintiff's amended bill, containing as an exhibit the record in the contest proceedings before the Interior Department, and containing the evidence offered in said contest proceedings and in view of the court's opinion, heretofore announced on the questions of law involved herein, plaintiff submitted his case on his amended bill and the exhibits thereto attached, and the admissions contained in the answer of defendants; and, thereupon, defendants

offered in evidence plaintiff's original petition and the written stipulation of counsel filed as Exhibit 'A' to the amendment to their answer to the plaintiff's amended petition, with Exhibits 'A' and 'C' attached to and made a part of said stipulation of counsel filed as their Exhibit 'A' to the said amendment.

"Plaintiff objected to the introduction in evidence of the exhibits attached to the amendment to defendants' answer to plaintiff's amended bill, and particularly to that portion of said exhibit which purports to contain the evidence taken in the office of the United States Indian Superintendent at Muskogee, Oklahoma, in the contest proceedings between the parties hereto in said Department, on the ground that said testimony or evidence offered is incompetent and irrelevant, and for the further reason that the facts found by the Department of the Interior in said contest proceedings are conclusive on the court under the issues tendered by the bill, and for the reasons stated in plaintiff's written objection to the filing and allowance of amendment to defendants' answer to plaintiff's amended bill. Plaintiff's said objections were overruled by the court, and the said evidence offered by defendants was admitted by the court, to which the plaintiff duly excepted.

"Plaintiff waived objection to the exhibits attached to defendants' amendment to their said answer on the ground that said exhibits were not properly certified, and agreed that said exhibits might be treated as though properly certified, but objected to the admissibility of the

transcript of the evidence before the Department attached to defendants' said amendment to their answer, on the same ground as stated in the written objections interposed by plaintiff to the allowance of the amendment to said answer and the exhibits thereto attached, and on the further ground that said exhibits attached to defendants' answer and the amendment thereto are not competent, relevant or admissible upon the issues tendered by the amended bill of complaint and the answer thereto; the court then and there overruled each such objection, and the plaintiff duly excepted to each such ruling; whereupon, after argument of counsel and due consideration thereof, the court is of the opinion that the plaintiff's pleadings are fully met and overcome by the defendants' answers and amendment thereto, and not sustained by the evidence."

Plaintiff's objections to the admissibility in evidence of the transcript attached to the last amendment to the answer, and the ruling against plaintiff thereon, which was duly excepted to, are presented by the fourth and eleventh assignments of error.

The court dismissed plaintiff's bill (Rec. 129). The ruling and the legal points involved therein are now presented by assignments fifth to tenth, inclusive.

The Exhibit "A" to the last amendment of defendants' answer (Rec. 78-122) is a stipulation of counsel (Rec. 78-88) showing: *first*, that a fifth *duly*

executed quintuplicate part (in addition to the quadruplicate parts required by the regulations) of the plaintiff's lease was, as alleged, duly recorded in Creek County, Oklahoma, on April 1st, 1912; *second*, certain departmental correspondence among officials concerning appraisement for "b o n u s" valuation, call for remittance of additional bonus by both contesting parties; *third*, an identifying Exhibit "C" to said Exhibit "A"; *fourth*, that Exhibit "A" to this exhibit and other mentioned documents was all the evidence before the department for the departmental hearing.

The stipulation reserved legal objections to the admissibility as evidence of the matters contained therein which objections were the same as assigned to its allowance as amendment to the answer.

Said Exhibit "A" to the stipulation (which was in turn Exhibit "A" to the answer) was a stenographic transcript of e v i d e n c e taken before an assistant to the United States Indian Superintendent and it will be commented on to some extent in argument. There was no exhibit "B" to the stipulation. Exhibit "C" thereto was a letter from the United States Indian Superintendent (Rec. 117-122) to the Commissioner of Indian Affairs dated July 18, 1912, supplementing his former opinion of July 1, 1912 (Rec. 42-51) transmitting his opinion and all documents to the Commissioner of Indian Affairs

for his attention. The stamp notation at the head of each indicates that both communications were received by the "office of Indian Affairs" on July 22, 1912. Both of these communications will be hereafter further noticed.

In the record are numerous references to Eastern Oil Company and Funk & Riter. The Eastern Oil Company was also a conflicting claimant to the lease now in controversy, but the department decided it had no standing whatever and it has never gone into court about it and is no party to this suit. Funk & Riter took a lease from the Indian to the other eighty acres of his allotment concerning which there was no conflicting lease, and no litigation in the courts. Hence no attention need be here paid to them. All matters pertaining to them were eliminated as far as practicable from this record but some reference thereto could not be omitted without mutilation of records.

All said matters were handled in one hearing in one "case" in the departmental offices.

Defendant David Gunsburg died after the decree of the Circuit Court of Appeals and the case was revived as to his representatives who have appeared herein.

SPECIFICATIONS *of* ERROR.

The specifications of error relied on by appellant in this case, omitting caption, are as follows (Rec. 130-133 and 143-145):

The United States Court of Appeals for the Eighth Circuit erred in affirming each of these rulings of the District Court of the United States for the Eastern District of Oklahoma:

First.

Overruling plaintiff's motion filed October 1, 1913, to strike out portions of defendants' answer to plaintiff's amended bill, as shown by the order made and entered October 3, 1913. (Rec. 68-76, 125-6, 60-67.)

Second.

Permitting defendants to file their amendment to defendants' answer to plaintiff's amended bill, and to attach thereto as exhibits the testimony taken and portions of the record before the United States Indian Superintendent at Muskogee, in the contest over approval of the leases between the parties to this action, as appears from the order made and entered on October 3, 1913, and the amendment to defendants' answer to plaintiff's amended bill filed on October 3, 1913. (Rec. 76-122, 123-4, 125-7.)

Third.

Overruling plaintiff's objections, filed October 3, 1913, to defendants' amendment to their answer, and in overruling plaintiff's motion, filed October 3, 1913, to strike defendants' amendment to their answer to plaintiff's amended bill, with the exhibits thereto attached, as appears from the order made and entered October 3, 1913. (Rec 123-4, 124-5, 125-7.)

Fourth.

Permitting defendants to introduce in evidence on final submission of this cause plaintiff's original bill, and in permitting defendants to introduce in evidence written stipulation of counsel filed as Exhibit "A" to the amendment to defendants' answer to plaintiff's amended bill, and Exhibits "A" and "C," attached to said stipulation of counsel filed as defendants' Exhibit "A" to said amendment. (Rec. 78-122, 125-7, 128).

Fifth.

Rendering judgment and decree that plaintiff's suit be dismissed, and in rendering judgment in favor of defendants against the plaintiff in costs, as appears from the final decree made and entered October 11, 1913. (Rec. 127-9.)

Sixth.

Holding that the recording laws (sections 670 and 671 of Mansfield's Digest of Arkansas) put in

force in the Indian Territory by Act of Congress of February 19, 1903, and the recording laws of the State of Oklahoma, and the Acts of Congress of March 1, 1907, and section 20 of the Act of Congress of April 26, 1906, referred to in plaintiff's bill, did not apply to the leases in controversy in this case, nor control the Secretary of the Interior in the discharge of his duty in approving or disapproving leases under the Act of Congress of May 27, 1908. (Rec. 127-129).

Seventh.

Holding that the Secretary of the Interior had plenary power to approve or disapprove leases uncontrolled by existing congressional legislation bearing thereon enacted prior to the Act of May 27, 1908. (Rec. 127-129).

Eighth.

Holding in substance and fact that neither the United States Indian Superintendent nor the Secretary of the Interior made any findings of facts as to the qualification of plaintiff as the lessee, and in further holding that because the Secretary of the Interior did not make any such finding, no court can review the Secretary's action with reference thereto. (Rec. 127-129.)

Ninth.

Holding that plaintiff's amended bill fails to state facts sufficient to constitute a cause of action in

favor of plaintiff and against the defendants, and that the "fourth paragraph" and the "fifth paragraph" of defendants' answer to plaintiff's amended bill state good and sufficient defenses to plaintiff's amended bill. (Rec. 127-9, 65-6.)

Tenth.

Construing the following regulation of the Secretary of the Interior:

> "All leases shall be in quadruplicate, and all the papers required shall be filed within thirty days from and after the date of execution by the lessor with the United States Indian Agent at Union Agency, Muskogee, Oklahoma,"

to be, in effect, a permission to lessees to withhold their leases for a period of thirty days from their execution, during which time subsequent lessees in good faith may not acquire any superior right, thereby making such regulation conflict with and override the laws of Congress with reference to the filing and recording of leases, and the recording acts in force in the State of Oklahoma relating to the filing and recording of instruments affecting real estate. (Rec. 127-9.)

Eleventh.

Holding that under the issues tendered by plaintiff's amended bill it was proper and competent for the court to consider the evidence submitted be-

fore the Department in the contest over the leases involved in this action, and to make findings of fact based on the record of the evidence before the Department of the Interior. (Rec. 127-9.)

ARGUMENT.

I.

First, Second and Third Assignments of Error.

For convenience and to avoid repetition of matter as far as practicable the assignments of error are, wherever possible, discussed in groups.

(1) The first, second and third assignments of error relate to matters of pleading and practice. The chief point is that the trial court permitted the defendants to inject into the case the evidence and record in the Department, thereby assuming to re-try the questions of *fact* as determined in the Department. These rulings were a violation of the elementary rule that a departmental decision on matters of fact is binding upon litigants unless the decision is attacked on some well settled ground which makes an exception to the rule. The case presented by the bill was one *involving only the question of law, it being simply that the law was by the Department misapplied to the conceded facts or those established without dispute.*

The decision of each officer of the land department set out at length as an exhibit to the bill needs no repetition of the evidence taken to see what the issue or adjudication was. The issue in this case tendered by the bill was the simple one *whether there was any error of law*, prejudicial to complainant on the facts found or conceded in the Department. It was not proper for the defendants at the trial on the merits, to re-try the facts or to determine whether the Departmental decision on the facts was proper. The rule as to what may be resorted to to show the issues adjudicated by the Department, is well established.

In determining the *scope of the issues* adjudicated by the Secretary "the pleadings, orders, opinions and judgment may be examined" "and in this contest before the land department the official reports of the registers and receivers thereon, the notices of appeals, the decisions of the commissioners and of the Secretary, the entire record of the proceeding *exclusive of the testimony*, constitute competent evidence from which to ascertain what issues were raised, litigated and decided in the contest." (*James* v. *Germania Iron Co.*, 46 C. C. A. 476, 107 Fed. 610.)

(2) The first assignment complains of the trial court's overruling of plaintiff's motion to strike out portions of defendants' answer to the amended bill.

(Rec. 68-76, 125-6, 60-7.) The motion was divided into several parts going to distinct portions of the answer sought to be eliminated by the motion.

(a) Motions A and G sought to strike out certain allegations by which the defendant raised the question of the adequacy of the bonus paid by plaintiff. As hereinafter more fully shown, it is not within the province of the defendants to raise this question. That is purely a question for the Secretary of the Interior, in the exercise of his judicial discretion in approving or disapproving the lease. He alone can determine whether it is provident or improvident for the Indian to make the lease. There was no hint that Anicker in any wise overreached him, but the record shows, without dispute, that he was treating the Indian better than the other parties to whom the lease was awarded. Anicker paid $50 for the lease and agreed to pay $350 more on its approval. The defendants took their lease for $80 agreed to be paid on approval of the lease and never paid the Indian a cent. The Department, in the course of its routine investigation, took the view that both bonuses ought to be raised and raised that which Anicker was to pay to $800 and that which the defendants were to pay to $600, thereby putting them upon an equality. Both Anicker and the defendants paid into the Department the full amount thus suggested to be paid.

There was no adjudication by the Secretary to the effect that the trades made with the Indian were set aside and annulled because the bonus was inadequate. The trades were taken as made and the additional amounts required to be paid into the Department to conform to its conception of what the bonus should be; this was done *as a part of the same trade* without requiring new leases to be executed or even considering it as of a new date. The very action of the Department conclusively shows that it was not rejecting Anicker's lease on the ground of inadequacy of bonus and that any further payment of bonus took the status of a new trade, because the making of the bonus $600 for the defendants and $800 for identically the same lease to Anicker upon the theory that in the few days elapsing between the execution of the leases the market price of the leases had increased, was for the very purpose of making each lease stand before the Department and be passed upon *as of the date when it was made*. If both leases took an official status as of the date when the appraisement was made the Department would be doing a manifestly improvident thing to reject Anicker's $800 bonus in favor of the $600 bonus from the other parties for the same lease.

The Secretary, *having decided this case solely upon a matter of law*, it was improper to attempt to inject issues of fact to be tried or re-tried going over

the same ground that was gone over in the Department.

Another ground of the motion was because the *defendants* invoked the jurisdiction of the federal court upon the sole and only ground that the case turned upon a question of law, which was the legal question adjudicated by the Department, and if they were permitted to inject issues of fact into the case upon which the case may be decided without discussing the law point it would show that the jurisdiction of the federal court was improperly invoked because its decision upon the law question was unnecessary.

(b) Motion B objected to a part of the answer (Rec. 62) and Motion E to the second paragraph (Rec. 64-65), attempting to raise the question whether Anicker was in fact a *bona fide* purchaser of the property. As we shall hereinafter show more at length, the Department ruled by necessary implication that Anicker was a *bona fide* purchaser. The case was presented by the bill solely as involving a question of law. This question should no more have been injected into the case than should the question of the adequacy of the bonus.

(c) Motion C sought to strike out the allegation (Rec. 62) that "they admit that said leases were invalid without the approval of the Secretary of the Interior." This was a shrewd and unfair attempt

to have it appear that both sides accepted the defendants' doctrine that the leases were without any validity whatsoever until the approval of the Secretary. As hereinafter shown, *the leases had inchoate validity*, but could not become valid in any efficient way, until the approval of the Secretary, which, however, related back to the date of the lease.

(d) Motion D sought to strike certain matter (Rec. 64) tending to show Anicker was not an innocent purchaser, and is covered by that which has just been said.

(e) Motion F sought to strike the third paragraph (Rec. 65) of the answer. The matter sought to be stricken out was but a legal argument presenting no defense to the bill, and no issue of fact upon which a defense could be predicated.

(f) Motion H sought to strike out the fifth paragraph (Rec. 66) which was nothing more nor less than a short general demurrer. The motion to strike was merely a means of testing that general demurrer. The court held that the bill did not present a case and in effect sustained this demurrer by his refusal to strike. The propriety of so doing will be discussed more at length under the argument of the ninth assignment of error.

(g) Motions I and J seek to strike the sixth and seventh paragraphs of the answer on pages 66 and

67 of the record. These two defenses set up the legal theory, wholly unsupported by the decisions, that the Secretary in the matter of the approval or disapproval of these leases was an absolute monarch untrammeled by any rules except his own volition, and that the courts are without jurisdiction to review the Secretary's action, no matter what kind of case may be presented. We argue this question of the nature of the Secretary's power and the jurisdiction of the courts more fully in a later part of this brief when discussing the seventh assignment of error. The court sustained the motion to strike so far as applied to the eighth and ninth paragraphs (Rec. 67-68) and no question is raised with reference thereto.

(3) The second and third assignments complain of the action of the trial court in permitting the defendants (Rec. 76-78) to amend their bill by filing an amendment, with exhibits thereto (Rec. 78-122) attached, which consisted of evidence only.

Most of the matter pleaded consisted of the oral examination of witnesses before the Department. It is an anomalous thing in pleading to attempt to put into the *answer* such matter as this, where the bill tenders solely a question of law. The assignments of error also cover the overruling by the court of plaintiff's objections to said amendment and his motion to strike the amendment. The amendment (Rec. 77) was not simply an improper answer

to the case presented by the bill assailing the Departmental decision as founded upon an erroneous view of the law, *but constituted a new and fresh assault upon the correctness of the Departmental decision* upon the theory that the decision was grossly *erroneous upon the facts*. It nowhere sets forth any proper allegations entitling the *defendants* to complain of that decision. It seems to have been filed only in the fear that the Department did err in the law and that it was necessary to have the decision changed so as to make the facts fit the law. The pleading was in part:

> "and that the Secretary of the Interior would not have and should not have approved his lease for such inadequate cash bonus, and defendants aver and plead that any findings of fact by the officers of the Department of the Interior and the Secretary of the Interior to the effect that the plaintiff was a *bona fide* purchaser of his lease or that the plaintiff at the time he purchased his lease on March 28th, 1912, and paid the Fifty ($50.00) Dollars therefor, had no notice of the prior lease to these defendants, *was a gross mistake of fact*, and that by a gross mistake of law the Secretary of the Interior and the officers in his Department through whose official hands the contest proceeded, *fell into a misapprehension of the facts proved before them.*"

It will be observed that this attacks the Departmental decision as a gross mistake of *fact;* also as a

gross mistake of law the Departmental official fell into a misapprehension of the facts proved before them. Yet this is done in a case where they claim the Departmental decision was in all things correct and should not be opened up. It is manifestly improper to permit this character of amendment. If the defendants were making an assault upon the decision they should have stated their case with the same particularity as if they were filing an original action, or a cross action in the nature of an original action, seeking to review same. The first ground of the objections to the filing of the amendment to the answer and of the motions to strike was that the amendment did not show the *particular* mistake in the finding of fact alleged to have been made by the Secretary and the way said mistake occurred. The second, third, fourth and fifth grounds (Rec. 123-5) were that the defendants cannot here have any revision of the Departmental action because it is not shown that they made any attempt in the Department to have said alleged error cured. The sixth ground, hereinafter, more fully discussed, was that the defendants have accepted the benefits of the Secretary's decision and are estopped to challenge its correctness now.

The objections and the motions also raise the point that if the case is to be decided on the question of *fact* set up in the answer it is a complete departure from the theory upon which the case was re-

moved to the federal court, that is, that it turned upon a federal question of law without which there would be no jurisdiction in the federal court. The objections and motion also raise the question that the matter sought to be injected into the case by said amendment is not responsive to any issue tendered by the bill.

(4) If these views be well founded manifest error was committed below in refusing (Rec.126-7) to strike out portions of the answer (Rec. 60-67, 68-76) and in permitting to be filed over objections (Rec. 123-4) an amendment (Rec. 76-122) to the answer.

II.

Fourth, Eighth and Eleventh Assignments of Error.

(1) The fourth assignment of error complains of the trial court's action (Rec. 128) in permitting the introduction in evidence of the departmental proceedings, *including the testimony of the witnesses*, the eighth assignment that the trial court held in substance that the Department never made any finding of fact concerning the qualifications of Anicker; and the eleventh assignment of the court's assertion in the decree that under the issues tendered by the plaintiff's amended bill it was proper and competent for the court to consider the evidence submitted be-

fore the Department and to make findings of fact based on the record of the evidence before the Department.

Notwithstanding the facts that the bill raises only the question whether the Secretary improperly applied the law to the facts, that the defendants removed the case to the federal court on the *sole* ground that the case turned on a question of law (not of fact), and the unbroken current of decisions that the departmental conclusion of fact is conclusive, the trial court's view practically made the case an appeal from the Secretary's ruling on the facts. This was clearly erroneous.

A departmental decision on facts is conclusive in the absence of fraud or mistake of fact. The bill shows the attack to be only upon an error of law. The petition for removal shows that only legal questions are involved. Hence departmental findings should not be opened up. (32 Cyc. 1020-2).

(2) Of course in a case of this kind, it must not only be shown that the approval of the lease to defendants was improper, but it must affirmatively appear that the approval of the plaintiff's lease was proper. That is shown, not only by the pleadings, but is also by necessary implication, shown by the departmental decision. It would be absurd for the departmental officers to enter upon a lengthy opinion upon the relative priorities of the parties if, for any

good reason, the approval of plaintiff's lease would be improper. In that event plaintiff would have no rights that could have priority. Then too the decision of the Secretary, while against plaintiff *on the law* by holding that prior filing can avail nothing, expressly says (Rec. 54) that if the law were otherwise and priority of filing could give any advantage, "*Anicker would have that advantage.*"

The findings and conclusions of the Department show affirmatively as well as by necessary implication that plaintiff had complied with all its requirements, was a fit person as lessee entitled to approval of his lease, and was on a par in all respects with defendants with the sole exception that their lease was executed prior to his, although not filed with the Department or anywhere else until after the filing and recording of that of plaintiff's.

(3) This question is of such moment that it is worth while to resort to the record.

In the letter of July 1, 1912, by Mr. Kelsey, containing his recommendations to the Department (Rec. 47) it is said:

> "The lease in favor of David Gunsburg and Southwestern Petroleum Company is dated March 20, 1912, and filed April 5, 1912, while the lease to W. J. Anicker bears date of March 28, 1912, and was filed March 30, 1912. The Department has uniformly held in such cases that

where a lease is filed, with the papers necessary for completion of same, within thirty days, that the date of execution is the date from which the priority of the lease is determined."

In the same letter (Rec. 50) Mr. Kelsey states:

"The lease of Mr. Anicker must also be disapproved, *not because he was in any way delinquent himself, but because of the prior lease of David Gunsburg and Southwestern Petroleum Company filed with all papers required within even a shorter period than that allowed by the Department.*"

By letter of August 26, 1912, transmitting leases for approval by the Secretary of the Interior, F. H. Abbott, Assistant Commissioner (Rec. 56) said:

"It has been the understanding of this office that the date of the lease, if filed with the Superintendent at Union Agency within the thirty-day period, governs instead of the date of filing and it is not the understanding of the office that leases must be filed in the county in which the land is located in order to give notice to a third party before the approval by the Secretary of the Interior."

In the letter of September 24, 1912, of Samuel Adams, First Assistant Secretary of the Interior, to the Commissioner of Indian Affairs (Rec. 52) it is said:

"The Anicker lease, executed March 28, was filed March 30; the Gunsburg lease, exe-

cuted March 20, was filed April 5. The rule of practice is that among competing leases duly filed in compliance with the rule, the lease first executed shall be accepted; *i. e.*, the date of execution governs. Anicker contends that the date of filing ought to g o v e r n. In your letter you say:

> It is contended that the leases should have been filed for r e c o r d in the proper county in conformity with the laws of the State of Oklahoma, and in view of the fact that the lease in favor of Anicker was so recorded, it should be approved.

"There seems to be a misapprehension here. There is nothing to show that Anicker's lease was recorded in the office of the County Recorder, either in the way of notation on the lease or testimony in the case. Evidently it was not so recorded, but the contention is that as the Gunsburg lease also was not so recorded, the latter ought not to prevail over a lease (Anicker's) which was filed first at the agency. The lengthy discussion of this point in the briefs does not convince me that the recognized rule of the Department should be changed, or s h o u l d be waived in this case. It has been long established and is well understood. It is suited to the conditions in which the oil and gas leasing business is carried on. In very many cases, a considerable time is required after the signature of a lessor is obtained, for the execution by the lessee, the making of the bond and other papers. The Secretary, in the exercise of the power vested in him by law, has given thirty days for this purpose. The

only inconvenience which may follow the enforcement of the rule, is where some enterprising person, in keen competition to secure a promising piece of land, induces the allottee to execute a lease to him, after he has already leased it to another; and having filed his lease at the agency, is subsequently informed that the lease executed prior to his has been duly filed and takes precedence. *For these reasons* the lease to W. J. Anicker (No. 22568) has been disapproved."

Again the Assistant Secretary of the Interior in his letter of December 10, 1912 (Rec. 53-4), said:

"Two of said leases covered the same land, one having been given to Gunsburg and the Southwestern Petroleum Company, the other to W. J. Anicker. *The former was approved on the ground of priority of execution, though the latter was filed first at Union Agency.* Both were filed at the Agency within thirty days from their execution, as required by rule * * * If there were any advantage in the prior filing of a lease which was entered into and executed after another lease, both having been filed at the Agency within the time r e q u i r e d by regulation, Anicker would have that advantage. The Act of March 1, 1907 (34 Stat. 1026), makes the filing at Union Agency legal notice. Anicker's lease is stamped as filed at the Agency March 30, 1912."

How could Anicker have any advantage, based upon priority of filing, if he was disqualified to have such priority by reason of any *fact* that would make

the approval of a lease to him improper? It is therefore clear that plaintiff must be deemed under the facts to have the right of priority, if the law, when correctly applied, supports it, because *(a)* the record of the department shows it, *(b)* the Secretary's decision shows it affirmatively and by necessary implication, *(c)* the fight in the department was conducted and decided on that theory which cannot be now changed here, *(d)* defendants have appealed to the jurisdiction of the federal court solely on a question of law and are estopped to try to have the case determined on grounds that would destroy the jurisdiction of this court in this case and *(e)* the propriety of approval or disapproval of a lease to Anicker is a question that concerns only the department and the Indian; they have waived any question as to the fitness of Anicker as lessee and the providence or improvidence of the lease to Anicker and are estopped to now raise any such question even if they were parties to this case; and defendants cannot raise any such question.

(4) Upon the facts, then, the law appears to be plain, the case being *Bogan* v. *Edinburg, Am. L. Mtg. Co.*, 11 C. C. A. 128, 63 Fed. 166. There an alien, notwithstanding his alienage, was accepted as a preemptioner under the land laws and paid his money. His right was later contested and the Commissioner of the General Land Office cancelled his entry be-

cause of such alienage. It was held that his action could be reviewed by the courts as an error of *law*, and that having been originally accepted and his money taken, the objection based on his alienage could not be later asserted. That estoppel against the Department not only bound it but also the party contesting title with said pre-emptioner.

Here, Anicker was accepted as a proper lessee and his money taken and additional money and bond required of him. No objection was made to him and no issue raised as to his fitness so that he might offer evidence thereon. The contest turned wholly on the question of law—priority of date or of recording—which matter of law is reviewable by the courts, and *the department and the defendants* are now estopped to assert any matter going to the desirability of Anicker as a lessee.

In his final opinion of December 9, 1912, the Secretary (Rec. 54) said:

> "If there were any advantage in the prior filing of a lease, both having been filed at the Agency, within the time required by regulation, Anicker would have that advantage. The Act of March 1, 1907 (32 Stat. 1026), makes the filing at Union Agency legal notice."

Again in the first part of his letter of December 9, 1912, to the Commissioner of Indian Affairs, he (Rec. 54) said:

"By letter of September 24, 1912, you were informed of the disposal of several leases by Eastman Richard, a full-blood Creek, upon his allotment of 160 acres. Two of said leases covered same land, one having been given to Gunsburg and the Southwestern Petroleum Company, and the other to W. J. Anicker. *The former was approved on the ground of priority of execution, though the latter was filed first at Union Agency.* Both were filed at the Agency within thirty days from their execution as required by rule."

These extracts from the final decision show conclusively the *sole* ground or reason on which the defendants' lease was approved, and Anicker's lease disapproved. Being set forth specifically there is excluded the idea of any other objection to Anicker's lease.

In *American Well Works* v. *Rivers*, 36 Fed. 880, 881, it is said:

"The trite maxim, *expressio unius est exclusio alterius*, * * * decides the case. See Bloom Leg. Max. 505. 'If there be several things of the same class or kind, the expression of one or more of them implies the exclusion of all not expressed; and this, even if the law would have implied all if none had been enumerated.' In the contract in question, the parties considered the guarantees to be given by the plaintiff, and they expressly stipulated for the guarantee as to quantity, and thereby it is manifest they excluded the more hazardous one as to quality."

The books sustain this view (*Thomas* v. *Wynne*, 122 Fed. 395, 400; *In re Herzikopf*, 121 Fed. 544, 546; *In re The Annie Faxon*, 66 Fed. 575, 581; *Wood* v. *U. S.* 16 Peters, 342, 364; *Kendall* v. *U. S.* 12 Peters, 523, 650, 651; *R. R. Co.* v. *Howard*, 13 Howard, 307, 340; *Olmstead* v. *Benefit Society*, 37 Kans. 93, 97, 14 Pac. 476; *Snavely* v. *Buggy Co.*, 36 Kans. 106, 111; 12 Pac. 522).

It follows, therefore, that but for the departmental regulation as construed by the Department, Anicker's lease was in all things in compliance with law and the departmental regulations, and entitled to approval.

(5) In the trial court defendants contended that the utterances of the Secretary in his opinion on rehearing of December 9, 1912, should not be considered because, as they claim, the decision of September 25, 1912, was final. (Rec. 51-3.) This involves the question when the jurisdiction of the department ends and that of the courts begin, for it is elementary that the courts have no jurisdiction until that of the department ceases. As to this there is no trouble. This clearly appears from the authorities. The party complaining of a departmental decision must exhaust his remedies before the department. (*Ross* v. *Stewart*, 25 Okla. 619; *Twine* v. *Carey*, 2 Okla. 256; *Estes* v. *Timmons*, 199 U. S. 391, 50 L. ed. 241; *Miller* v. *Margerie*, 149 Fed. 694.)

Departmental control is not ended until motion for review is decided. (*Cope* v. *Braden*, 11 Okla. 295; *Cox* v. *Garrett*, 7 Okla. 384; *Smith* v. *Finger*, 15 Okla. 129.)

The department has the right to entertain a motion for rehearing and to reverse itself therein (*Love* v. *Flahive*, 205 U. S. 195; 51 L. ed. 768; 32 Cyc. 1019; *U. S. ex rel. Knight* v. *Lane*, 228 U. S. 6, 57 L. ed. 709.)

It was not only proper, but it was complainants' duty to exhaust those remedies before appealing to the courts.

Judgment maybe entered *nunc pro tunc*. (*Topley* v. *Goodsell*, 122 Mass. 176; *Walden* v. *Walden*, 128 Ga. 126, 57 S. E. 323.)

A supplemental opinion may be filed as of the date of the first opinion setting forth the facts on which the court acted and the original opinion may be modified on the denial of a motion for rehearing. (11 Cyc 762; *Lester's Appeal*, 11 Atl. 387 (Pa.); *Adams* v. *R. R.*, 77 Miss. 194; 24 So. 200, 317, 28 So. 956; 60 L. R. A. 33, 114, 116.) A case virtually to same effect is *U. S. ex rel Lowe* v. *Fisher*, 223 U. S. 95, 100.

A court may add to its opinion (*Houston* v. *Williams*, 13 Cal. 24, 73 Am. Dec. 565, per FIELD, J., L. R. A. 116 referring to the appendix to 131 U. S. p. XVIII.)

It was therefore perfectly proper for the Secretary to supplement his opinion on the original decision by a supplemental utterance, which may be looked to, in order to ascertain the real basis of the decision.

(6) By necessary implication the department has ruled that Anicker was a *bona fide* purchaser of his lease (Rec. 53) by holding, that if the law was such that prior recording gave any advantage, "Anicker would have that advantage." (Rec. 54.) He could not have that if he were disqualified by not being deemed a *bona fide* taker of the lease. It is alleged (Rec. 8) and expressly admitted by the answer that he paid the Indian $50 at the execution of the lease (Rec. 60) and deposited the additional bonus with the U. S. Indian Agent for the Indian's benefit and gave bond and did all things required of him to merit departmental approval. Under settled legal principles he should be protected.

In *Van Ness* v. *U. S. Bank*, 13 Pet. 17, 10 L. ed. 38, it was said:

> "The soundest principle of justice and policy would seem to demand that every reasonable intendment should be made to support the titles of *bona fide* purchasers of real property; and this court is not disposed to impair their safety, by insisting upon matters of form, unless they were evidently required by legislative authority."

The plea of *bona fide* purchaser is one favored in the law and in *U. S.* v. *Cal. & O. L. Co.*, 148 U. S. 42, 37 L. ed. 360, it was said:

> "The essential elements which constitute a *bona fide* purchaser are, therefore, three: a valuable consideration, the absence of notice, and presence of good faith."

There is no proof of notice to Anicker of the Gunsburg lease when Anicker took his lease and paid his $50 and bound himself for a goodly sum more and he should be protected.

In *Stanley* v. *Schwalby*, 162 U. S. 476, 40 L. ed. 967, it was said:

> "But in order to charge a purchaser with notice of a prior unrecorded conveyance, he or his agent must either have knowledge of the conveyance, or, at least of such circumstances as would, by the exercise of ordinary diligence and judgment, lead to that knowledge; and vague rumor or suspicion is not a sufficient foundation upon which to charge a purchaser with knowledge of a title in a third person. *Wilson* v. *Wall*, 73 U. S. 6 Wall. 83 (18: 727); *Flagg* v. *Mann*, 2 Summ. 486, 551; *Montefore* v. *Browne*, 7 H. L. Cas. 241, 262, 269; *Bailey* v. *Barnes* (1894) 1 Ch. Div. 25; *Wothered* v. *Boom*, 17 Tex. 143. Notice of a sale does not imply knowledge of an outstanding and unrecorded conveyance. *Mills* v. *Smith*, 73 U. S. 8 Wall. 27 (19:346); *Holmes* v. *Stout*, 10 N. J. Eq. 419; *Lamb* v. *Pierce*, 113 Mass. 72.

"A valuable consideration may be other than the actual payment of money, and may consist of acts to be done after the conveyance. *Prewitt* v. *Wilson*, 103 U. S. 22 (26:360); *Hitz* v. *National Metropolitan Bank*, 111 U. S. 722, 727 (28:577, 759); 4 Kent. Com. 463; Dart, Vendors (6th ed.) 1018, 1019."

Where a vendor presents titles *prima facie* valid the buyer may rely on them without further investigation (*U. S.* v. *Detroit L. & T. Co.*, 200 U. S. 321; 50 L. ed. 499.)

A junior purchaser whose deed is first recorded is presumptively a *bona fide* purchaser for value without notice and the burden of proof to the contrary rests on the senior purchaser, whose deed has not been recorded. (*Gratz* v. *Land & R. I. Co.*, 82 Fed. 381 (C. C. A. 7th Cir.). (*Certiorari* denied in that case 173 U. S. 705; 43 L. ed. 1186); *In re Ducker*, 134 Fed. 50 (C. C. A. 6th Cir.) (LURTON, J., participating); *Stout* v. *The Richard J. Carrey*, 53 Fed. 927 (C.C.A. 7th Cir.); *White* v. *McGarry*, 47 Fed. 420.)

While some states hold that one claiming to be a *bona fide* purchaser without notice of a prior conflicting conveyance must show it as an affirmative defense. (39 Cyc, 1782). Yet when he shows that he was a purchaser for value, the burden shifts to the other to show that the purchaser had notice. (39 Cyc 1782; *Manchester* v. *Gosewich*, 95 Ark. 582; 130 S. W.

526; *Osceola Land Co.* v. *Chicago, etc., Co.*, 84 Ark. 1; 103 S. W. 609 overruling former cases and citing others; *Walter* v. *Brown*, 115 Ia. 360; 88 N. W. 832; *Hodges* v. *Winston*, 94 Ala. 576; 10 So. 535; *Barton* v. *Barton*, 75 Ala. 400; *Anthony* v. *Wheeler*, 22 N. E. 494; 130 Ill. 281; *Anthony* v. *Wheeler*, 17 A. S. R. 281, and note; *Kruse* v. *Conklin*, 82 Kan. 358; 108 Pac. 856.)

The actual payment of $50 and binding himself to pay several hundred dollars more is certainly a valuable consideration, especially as the prior unrecorded lease of defendants was for a bonus of only $80. (Rec. 81.)

(7) The Secretary having approved defendants' lease on the *sole ground that it was executed prior to Anicker's lease*, defendants are precluded from raising any other issue than the correctness of the conclusion of law.

In *Anderson* v. *Chrisman*, 37 Okla. 73; 130 Pac. 539, the general rule is thus stated:

> "When the court, in granting a new trial, specifies fully and in detail the reason upon which the act is based, it would be presumed that the reason thus stated is the only one upon which the court acts."

When an order of an appellate court does not appear to have been founded upon the facts, we must

presume that it was upon the law. (*Orvis* v. *Curtiss*, 52 N. E. 691; 157 N. Y. 657; *Orvis* v. *Curtiss*, 68 Am. St. Rep. 810.)

The well known principle, *expressio unius est exclusio alterus*, already referred to, applies. Anicker's lease was rejected on one ground only, and for the one reason, specifically set forth in the Secretary's final opinion, *i. e.*, the defendants' lease was executed prior to the Anicker lease, and by Department regulation, priority of date of execution governed, notwithstanding the recording acts, and notwithstanding that Anicker was an innocent purchaser for value and without notice of the prior lease.

The trial in the Department, as evidenced by the opinions of the Superintendent, the Commissioner and the Secretary, all show the *question of fact* to have been concluded in Anicker's favor. If the opinions of the Superintendent and of the Commissioner and of the Secretary must all be construed as discussing the question of law only it is eloquently persuasive that the question of fact which would have defeated Anicker according to the defendants' present contentions was not insisted upon before those decisions. If not insisted upon, it comes in the category of *facts conceded* before the Department as to which the misapplication of the law will be reversible in the courts b e c a u s e the universal expression of cases in which the courts will interfere, is for *errors*

of law by the Department upon *(a)* the facts found by the Department, *(b)* Those conceded there, and *(c)* Those there proven beyond dispute. Inasmuch as the trials all took such form as to bring forth no other decision than the matter of law, as to which these officials labored heavily and reached erroneous conclusions, there can be no other fair inference than that the legal question alone was involved, because the question of fact was conceded.

It will be noted that the decisions of the courts indicate that the departmental proceedings asking approval is one to which the lessor Indian is not a party. The department cannot make a lease or initiate one. It can only approve or veto one already as complete as the parties can make it. Its only function is to guard the Indian against his own improvidence. The department fixed the amount of bonus at $800, when Anicker's lease was taken, and at $600 when defendants' lease was taken (Rec. 84) and both complied with it. (Rec. 85-7.) It previously fixed the form of lease and both leases followed the approved form. Both lessees gave satisfactory bond required by the department. The only possible other element of "improvidence" to guard against would be the matter of contracting with an insolvent or dishonest lessee. No such question was raised; on the contrary if such question had been raised a simple decision disqualifying one lessee would leave the field of con-

test to the other without an elaborate contest based on claims of priority. If Anicker were considered disqualified, or if for any reason other than a difference in bonus price or terms of lease, a lease to Anicker, a local resident, would be deemed less advantageous to the Indian than one to the non-residents, Gunsburg (now dead) and the Southwestern Petroleum Company, a simple decision saying so would have disposed of a long drawn out and elaborately contested and elaborately decided departmental litigation, and would have rendered all decisions *obiter dictum*.

The Circuit Court of Appeals for the Eighth Circuit (*James* v. *Germania Iron Co.*, 46 C. C. A. 476; 107 Fed. Rep. 612, 613) has decided the identical point now being considered, that is that the decision upon the law point, of the priorities of the parties, *implies a state of decided facts making the law point necessary to be decided. Judge* SANBORN *said:*

> "James' appeal challenged Hartmann's right to enter the land, and, while it raised the question of law whether or not James' prior application was valid, it as clearly presented the issue of the priority of Hartmann's application on February 23, 1889. A finding of the latter issue against Hartmann would have been as fatal to his entry as the decision of the question of law against him. *Not only this, but the question of law did not and could not arise in the contest between Hartmann and James until the Secre-*

tary had first found that Hartmann was the first applicant on the morning of February 23, 1889. If he had decided that Hartmann was not first on that day, that finding would have rendered the decision of the question involving James' application of February 19th unnecessary to determine the contest between him and Hartmann; and the fact that he did find, before he commenced to write his opinion, that Hartmann was first, *and that fact alone, rendered the decision of the question of law necessary to a disposition of the contest between James and Hartmann.*"

Even if there be a doubt whether the decision of the question of fact, which must inevitably be read into the decision, was in favor of one party or the other in considering the effect of the Secretary's assertion that "Anicker would have the advantage" of a prior recording, the difficulty is easily solved. Those officials all declare they decided the case in Gunsburg's favor and against Anicker *upon the law question.* It is therefore inconsistent with their language to impute to them the decision on the *question of fact* against Anicker. It is entirely consistent with their opinion to impute to them a decision in Anicker's favor upon the facts and against him on the law. We must therefore avoid a contradiction of the express declaration of those officials themselves which impels the interpretation that the court decided in favor of Anicker on the facts though making the ultimate conclusion against him upon the legal question.

As a matter of law, however, it must be presumed the fact was decided in Anicker's favor and the law question alone decided against him.

The Secretary having approved defendants' lease on the *sole* ground that it was executed prior to Anicker's lease, the defendants are precluded from raising any other issue than the correctness of the Secretary's conclusion of law.

The defendants in their brief below deplore the fact that the Secretary "gave no opinion" indicating the reason why one lease was approved and the other disapproved, which is lost emotion in view of the plain statements of the record. It appears (Rec. 53) from the final opinion of the Secretary of the Interior that he states clearly and specifically the reason for his action to be:

> "The former (defendants' lease) was approved on the ground of priority of execution, though the latter (Anicker's lease) was first filed at Union Agency."

The defendants made the point below that no opinion or reason by the Secretary of the Interior is required by law, and because not specifically required, any reason given must be ignored and we must speculate as to his reasons if they may be considered at all. The law does, at least by practice and implication, recognize the propriety, if not the necessity, of opinions by the Secretary. His office has pub-

lished some forty printed volumes of such opinions. These are found in law libraries and departmental offices. They are published as precedents which the courts say will be given weight as some authority. How could departmental opinions be published and be made precedents, unless they were written up and promulgated for that purpose? An opinion by the Secretary is the most usual and sensible f o r m of showing the departmental view of any case. The Secretary has been made a quasi-court, vested with wide authority, and he adjudicates the rights to millions of dollars' worth of property. Yet the defendants would have him classed in the same category as a justice of the peace, who neither writes nor is expected to write opinions in his cases. Chancellors are not absolutely required to write opinions, but it is their habit. The practice is commended generally, and never condemned.

In their brief below defendants' counsel contended that as the Secretary gives only one reason for his action, we are not to regard that reason as the controlling one, but that we must presume he had some other reason which he withheld. If this view be indulged no case would e v e r be entertained in the courts to review Department action. There could be no review of a public land case, although the law was erroneously decided, because, if defendants be right, the courts must presume that there were other un-

disclosed reasons and that such reasons were based on conflict of fact which warranted the ultimate decision and which is not reviewable. Such an argument wholly discredits the opinion of the Secretary and instead of according it respect, in effect declares that his opinions must be regarded as only fragmentary because of other possible good reasons not disclosed, and must be w h o l l y disregarded. In the strange argument of the defendants it should be wholly repudiated as worthless and not binding *in this case*, but when hereafter cited as a precedent *in other cases* it must be profoundly respected as based upon the deliberate opinion of the Secretary.

(8) Defendants cannot now change the theory of the case as presented to and passed on by the Department so as to raise new issues.

> "When the parties, with the assent of the court, unite in trying a case on the theory that a particular matter is within the issues, they will not be permitted to depart therefrom when the case is brought before an appellate court for review." *(M., K. & T. Ry. Co.* v. *Wilhoit*, 87 C. C. A. 401, 160 Fed. 440; also *Railway Co.* v. *Estill*, 147 U. S. 591.)

In *Territory* v. *Cooper*, 11 Okla. 708, the court said:

> "It was also said in *Davis* v. *Wakelee*, 156 U. S. 680: 'It may be laid down as a general

proposition, that where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him;' and it was held that although the judgment was void for want of jurisdiction, that the debtor was estopped from asserting its invalidity."

The Davis-Wakelee case was followed in *Davis* v. *Cornwall*, 15 C. C. A. 559, 68 Fed. 522, 525, where it was said:

> "The plaintiff, as well as the defendant, was bound to know the law, and, by conclusive presumption, could not have been misled by the defendants' statement that the judgment was in full force, when in fact it was a nullity, because of want of jurisdiction of the court which rendered it. He was prejudiced, not by any false statement of the defendant, but by the conduct of the defendant in procuring a disposition of his legal rights by a judicial tribunal to his disadvantage, and for the benefit of the defendant; and if he chose to acquiesce the defendant ought not to be permitted now, with the fruits of his conduct in his hands, to assert that what he then maintained was a delusion, and that the disposition made was wrong."

In *Luther* v. *Clay*, 100 Ga. 241, 28 S. E. 47, 39 L. R. A. 97, the court made the same quotation from the *Davis-Wakelee* case and said:

> "Having invoked a ruling from the court that the foreclosure was valid, and this decision having been acquiesced in and acted upon by the party against whom it was made, she cannot be heard to attack the judgment which she obtained, and of which she took the benefit, although it may have been an erroneous one."

Defendants, having accepted the departmental findings and received benefits thereof, are estopped to attack them now. *(K. C. F. S. & M. Ry.* v. *Murray*, 57 Kan. 697, 47 Pac. 835; *McDaniel* v. *Stum*, 23 Ky. Law Rep. 1935, 65 S. W. 800; 23 Cyc. 897.*)*

(9) To permit defendants to change theories now would virtually permit them to deny the jurisdiction of this court which they have invoked, for, if this case was correctly decided upon the facts in the department, without considering the question of law, then the allegations of the petition for removal are untruthful, for no question of law would be involved.

> "A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, *construction or effect* of such a law, *upon the determination of which the result depends.*" *(Shulthis* v. *McDougal*, 225 U. S. 569, 56 L. ed. 1211.)

Upon reading the petition for removal in the case at bar it will be seen that the federal court's jurisdiction is invoked upon the ground that the case turns upon a matter of law, a construction of certain statutes, and not upon any matter of fact that might, conceivably, dispose of the case without reaching the law point for decision.

Some land cases involve merely matters of law and others involve both law and facts. The former, when they involve the construction of federal statutes, are removable, while the latter may or may not be removable. The distinction is pointed out by Mr. Justice Brewer when he said:

> "But we think the true inference from this difference of procedure is to the contrary, because, in respect to agricultural lands, it is settled that all questions of fact are determined by the Land Department, and that after the issue of a patent only questions of law are open for consideration in the courts, and, as the laws of Congress alone determine the matter of the disposal of the public lands, it follows that the questions of law which are thus open for consideration are those arising under the acts of Congress. While on the other hand, as we have heretofore shown, in these adverse suits preliminary to a patent of mineral lands not merely questions of law arising under the statutes of the United States, but questions of fact and questions arising under local rules and customs and state statutes are open for consideration. The scope of the inquiry

which is permissible in the two cases emphasizes the fact that in the latter case the controversy may be one not arising under the Constitution or laws of Congress." (*Shoshone M. C.* v. *Rutter*, 177 U. S. 511, 44 L. ed. 867.)

A concise statement of the test by which it may be determined whether a case is removable is stated thus:

> "The attempt to transfer this cause was made under that part of Sec. 2 of the act of 1875 which provides for the removal of suits arising under the Constitution or laws of the United States. In the language of Chief Justice MARSHALL, a case may truly be said to arise under the Constitution or a law of the United States whenever its correct decision depends upon the construction of either, *Cohen* v. *Virginia*, 6 Wheat. 379, 5 L. ed. 285, or when the title or right set up by the party may be defeated by one construction of the Constitution or law of the United States, or sustained by the opposite construction. *Osborn* v. *Bank of U. S.*, 9 Wheat. 822, 6 L. ed. 224." (*Blackburn* v. *Portland. G. M. Co.*, 175 U. S. 580, 44 L. ed. 281.)

The petition for removal shows that it depends on law questions only. If it depended on a question of fact there would be no jurisdiction. Are not the defendants, after invoking jurisdiction of the federal court upon the ground that it involved law only, estopped to assert that it involved both law and

facts, thus ousting the jurisdiction, especially when the bill shows the legal question only?

"The case having been removed to the circuit court upon petition of defendant, it does not lie in its mouth to claim that such court had no jurisdiction of the case, unless the court from which it was removed had no jurisdiction." (*Conley* v. *Nor. Pac. R. Co.*, 159 U. S. 569, 583, 40 L. ed. 263, 267; *Seward* v. *Comcan*, 103 U. S. 86, 26 L. ed. 438; *Bushnell* v. *Kennedy*, 9 Wall. 387, 19 L. ed. 736, 738; *Fisher* v. *Shropshire*, 147 U. S. 133, 37 L. ed. 109; *Ayers* v. *Watson*, 113 U. S. 594, 28 L. ed. 1093; Note to 15 L. R. A. 273; *Garrozi* v. *Dastas*, 204 U. S. 64, 51 L. ed. 369; *Tootle* v. *Coleman*, 107 Fed. 41 (C. C. A. 8th Cir.); 16 Cyc, 798.)

One cannot repudiate a jurisdiction to which he has appealed. (*More* v. *Steinbach*, 127 U. S. 70, 32 L. ed. 55.)

When federal question disposed of, the cause will be remanded. (*Hamblin* v. *C.B.& Q.Ry.*, 43 Fed. 401 (per GRESHAM, J.); Judicial Code, Sec. 37, 4 Fed. Stat. Ann. 371, *et seq.*)

(10) Whether Anicker is a proper lessee, or whether he has complied with all the pre-requisites to making a valid contract with the Indian, or whether the Anicker lease is provident, are matters which defendants cannot set up. They are strangers to An-

icker's contract. Even if Anicker had defrauded the Indian it does not concern the defendants and it is for the Indian alone, or the Department acting as his *quasi*-guardian, to assert it or waive it.

The defendants, who are strangers to the Anicker lease, have no right to raise questions that are personal to the Indian, matters within the doctrine of *res inter alios acta*.

In 22 Cyc, 129, it is stated:

> "In Canada the right of Indians to alienate their lands is also restricted."

In a note thereto this appears:

> "See *Boucher* v. *Montour*, 20 Queb. Sup. Ct. 291, holding that the nullity of sales or leases of property on an Indian reserve is only relative and can only be invoked by the Indians; those who have dealt with the Indians cannot avail themselves of it."

Upon that principle defendants cannot object that the lease to Anicker had not been aproved. Such objection could only be made by the Indian, even if by him.

III.

Fifth Assignment of Error.

This assignment of error complains of the action of the trial court in rendering decree in favor of the

defendants, and may be said to present, in an ultimate sense, the vital question whether this case has merit. The argument to the Sixth, Seventh, Eighth, Ninth and Tenth assignments of error likewise go to the merits of the case and are adopted as part of the argument upon this assignment. Those assignments discuss law points which underlie the court's action complained of in the fifth assignment and for convenience and clearness of presentation they are discussed separately.

There was no propriety in introducing in any way the evidence in the departmental case. As the bill was presented by the plaintiff only the legal question was p r e s e n t e d. Defendants recognized that status and the legal principle that when the question is presented w h e t h e r the department committed *error of law* in its decision, the legal question only will be examined. Plaintiff was content to have the legal question alone examined in the federal equity court. Defendants were not willing to try this case on that legal question so presented and sought to devise a plan by which they might open up the facts and get around the departmental conclusion on the facts. Accordingly they made the feeble and peculiar assault upon the department's conclusion of f a c t s complained of in the fourth and eleventh assignments of error. By the error there committed the trial court permitted the departmental conclusion of facts to be

opened up, and without setting the matter at large for a new conclusion by the trial court upon evidence heard by the trial court, the court sat as an appellate court reviewing the departmental conclusions of fact upon the evidence before the department. In that aspect it is claimed that the bill was properly dismissed because defendants say Anicker was not a *bona fide* purchaser. While the question is not properly in the case yet the court's action compels us to discuss the question.

(1) *Anicker was a bona fide purchaser.*

The evidence must be viewed, if at all, in the light of the principles stated in the second division of the argument on the 4th, 8th and 11th assignments of error, abundantly supported by authorities, that the plea of *bona fides* is one favored by the law; and that a junior purchaser whose deed is first recorded is presumptively a *bona fide* purchaser.

Defendants' lease was dated Mch. 20, 1912,(Rec. 29) and was filed in the Union Agency April 5th, 1912, and never in the county recording office at all, an unexplained delay of fifteen days. Anicker's lease was dated March 28, 1912, and filed in the Union Agency March 30, 1912, six days before defendants' lease was filed there (Rec. 17) and was recorded in the county office (Rec. 54; Stipulation, Rec. 78) on April 1st, 1912, likewise before defendants' lease was filed in the department.

Anicker was a *bona fide* purchaser of the lease and *defendants were not* and they are not in a position to assail the *bona fides* of Anicker.

E. C. Motter (Rec. 92-95) testified:

"Q. Were you present when the oil and gas mining lease was executed by Eastman Richard and William J. Anicker, on the West Half of NE¼ of section 5, Twp. 17 N., Range 7 East? A. I was.

Q. Who else was present? A. I think Mr. Van Smith, J. B. Furry, Robert A. Zebold and Blanche Ashton.

Q. Was there any conversation there with reference to the lease on that 80? A. There was.

Q. Between who? A. Between Anicker and Eastman Richard, the allottee, and also between myself and Eastman Richard.

Q. What was the conversation? A. My recollection is that I quizzed Eastman about the execution of leases to ascertain his understanding, and I asked him whether he had executed a lease covering this land before, and he replied he had.

Q. To whom? A. He replied to the Eastern Oil Company.

Q. The Eastern Oil Company? A. Yes, sir.

Q. Was there anything further said? A. I asked him if he executed a lease on this particular 80 acres to any one. He stated he had not. To Funk and Riter, he stated he had not.

Q. Who are you acting for? A. Mr. Anicker.

Q. Did you make any investigation in the office of the Indian Agent with reference to whether there was any lease on file covering the west 80? A. I did.

Q. What did you find? A. I found there was a lease on file in this office to the Eastern Oil Company covering that but the lease had not been filed within 30 days within the regulations and I advised Mr. Anicker the Eastern Oil Company lease was not good. Having first talked with Eastman he having stated he did not wish their lease approved. I had prepared for Eastman the declaration which is on file with the lease; I also filed the lease on the west 80; I found no lease on file on the west 80.

Q. You stated when Eastman made the lease to Mr. Anicker you were present in his office. A. Present in my office.

Q. You said that Eastman Richard told you he had made a lease on that land before that day? A. Made a lease to the Eastern Oil Company, which he did not wish approved. He was going to file a protest against the approval of this lease, and asked for the approval of the Anicker lease.

Q. Didnt he tell you he had made a lease on March 20th? A. He did not. He stated he never made any lease, only to the Eastern Oil Company on 160 acres and Funk & Ritter on the east 80.

Q. You said he had told you he had not

made a lease outside of the Eastern Oil Company? A. He did.

Q. When Eastman Richard was in your office at the time the lease was first executed to Mr. Anicker, I understand that Mr. Anicker or you come over to the Agency to investigate the records? A. I did.

Q. When you came back you told Eastman he could make a lease without involving himself in any difficulty? A. Didn't tell Eastman anything of the kind. Told Mr. Anicker if he did not wish the Eastern Oil Company lease approved by signing a waiver, which he had agreed to sign that necessarily would void the lease on the other 80 if Mr. Anicker would take a lease on the west 80.

Q. Was not Eastman Richard informed at that time that he could execute a lease on that 80 that would not involve him whatever? A. No, I don't recollect that. The fact of the matter is I did not advise Eastman in any way.

Q. As a matter of fact, at the time you advised Mr. Anicker to take the lease on this west 80 why did you do that? A. Why did I advise Mr. Anicker?

Q. Yes, sir. A. I advised Mr. Anicker the lease on the west 80 in my judgment was a valuable lease, and would be approved by the Department for the reason that Eastman had filed a protest against the Eastern Oil Company lease and he said he had made no lease on the west 80.

Q. You found out afterwards there had been

a lease made? A. I found out later, the first notice I had of the Gunsburg and Foreman people I found in the Legal Record published here, in which they had a lease filed in the Agency. After I saw that I came over here then and examined the papers. That was the first I got. Before advising Mr. Anicker I had him call up the Register of Deeds at Sapulpa to ascertain whether there was any lease on record.

Q. You are aware they do not usually record Department leases before they are approved?

Q. What did you then advise him to do? A. After that I advised him to file with the Register of Deeds."

On March 29th, 1912, the lessor Eastman Richard (Rec. 26) made affidavit as follows:

"I, Eastman Richard, of Pierce, Oklahoma, being first duly sworn according to law, state upon oath that I am more than 41 years of age, and that under date of March 28th, 1912, I made an Oil and Gas Mining Lease with William J. Anicker, covering 80 acres; that said lease was read over and fully explained to me at the time that I signed same, and I understand the nature, contents, and effect thereof; that I made said lease in good faith for the purposes therein specified, and now join in the application of the lessee for its approval by the Secretary of the Interior.

"I further swear that, other than the terms of the lease described, the only contract, agree-

ment, or understanding between myself and the lessee covering additional payments made or to be made as bonus money, or any other consideration, is as follows:

"Four Hundred and No/100 dollars ($400.00) as bonus, of which amount I acknowledge the receipt of $50.00, the balance, if any, payable when lease is approved."

The Indian, Eastman Richard (Rec. 109) testified as follows:

"Q. Eastman you signed the declaration that has been filed here in the Indian Agent's office 18750 saying you had made this lease to Anicker in good faith in both, is that correct? (The interpreter here reads to the witness the affidavit marked Exhibit 'B'.) A. I signed a number of papers and I signed this one.

Q. Was it read over and explained to you? A. It was read but not made quite clear.

Q. Is it clear now? Do you still stick to it? A. Yes, I understand it. Before I say whether I stick to it or not, I want the question of the oil and gas lease that I signed, settled."

The Indian, though willing to contract when he did, was eager to get even more for his leases than these parties paid him for he was represented by counsel at the hearing (Rec. 88, 100). The following statement (Rec. 83) of the record shows the attitude of the Indian thereafter:

"It seems that counsel for Eastman Rich-

ard, the lessor, were contending before the Department, that the oil inspector's report as to the adequacy of bonus, did not report a sufficient amount of bonus, and that the lessor was entitled to more."

The letter of Oil Inspector Morrison (Rec. 84-5) answering the contentions of the Indian's lawyers for more bonus should be noted. Considering his later hostility to Anicker in his hunger for larger bonus, the Indian's testimony is highly favorable to Anicker.

On April 12, 1912, the Indian made (Rec. 115) this further affidavit:

"AFFIDAVIT.

"*State of Oklahoma, McIntosh County—ss.*

April 12.

"Personally appeared before me, L. C. Clark, a notary public in and for said county and state, Eastman Richard, of lawful age, who being first duly sworn by me alleges and states as follows:

"That heretofore, to-wit, on the 29th day of November, 1911, I executed an oil and gas lease in favor of the Eastern Oil Company, covering my allotment in the Creek Nation, described as the northeast quarter of section five (5), township seventeen (17) north, range seven (7) east, for which I received a bonus in the sum of Eighty ($80.00) Dollars; that on the 20th day of March, 1912, I executed an oil and gas lease in fa-

vor of A. L. Funk and O. E. Riter, covering the east half of the northeast quarter of section (5), township seventeen (17) north, range seven (7) east, being the east 80 acres of my said allotment in the Creek Nation; that on the 29th day of March, 1912, I executed an oil and gas lease in favor of William J. Anicker, covering the west half of the northeast quarter of section five (5), township seventeen (17) north, range seven (7) east, being the west 80 acres of my said allotment in the Creek Nation; that I received as a bonus for the execution of said oil and gas lease to said William J. Anicker the sum of Fifty ($50.00) Dollars, and with the further agreement that I would receive from the said William J. Anicker an additional sum of Three Hundred and Fifty ($350.00) Dollars upon approval of said lease by the Secretary of the Interior.

"I further state that all of said leases, to-wit; that to the Eastern Oil Company, that to A. L. Funk and O. E. Riter, and that to William J. Anicker, were executed by me in good faith and for the considerations above mentioned.

"That on the 29th day of March, 1912, I executed a declaration before Robert A. Zebold, a notary public in and for Muskogee County, State of Oklahoma, with reference to the execution of said leases, and in which I requested the cancellation of the lease executed by me in favor of the Eastern Oil Company, for the reason that said Eastern Oil Company had failed to file its lease for approval within the time limit of thirty days as required by the rules and regulations

prescribed by the Secretary of the Interior for the approval of oil and gas leases.

"I am now informed that since the execution of the aforementioned oil and gas lease in favor of William J. Anicker, and since the same was filed by him in the office of the United States Superintendent at Muskogee, Oklahoma, a lease purporting to have been executed by me in favor of David Gunsburg and Southwestern Petroleum Company, covering the west half of the northeast quarter of section five (5), township seventeen (17) north, range seven (7) east, has been filed with the United States Indian Superintendent at Muskogee, Oklahoma, for approval by the Secretary of the Interior. That I am also informed that said lease was executed on the same day as the lease executed by me in favor of A. L. Funk and O. E. Riter, to-wit, the 20th day of March, 1912, and that both leases appear to have been acknowledged before the same notary public, and their execution witnessed by the same witnesses.

"I now deny the execution of any oil and gas lease by me in favor af David Gunsburg and Southwestern Petroleum Company, and s t a t e that if my signature is affixed to any such lease, that the same was secured from me by false and fraudulent representations, and that if I signed such a lease and acknowledged the same before a notary public, as I am informed that I did, that my signature thereto and acknowledgment were procured by f a l s e and fraudulent representations. That I believed at the time of the execution of the lease to A. L. Funk and O. E. Riter

that I was leasing only the east 80 acres of my allotment, and that I did not intend, nor did I understand, that I was signing a lease to any other of my lands.

"I further state that I received no consideration from the said David G u n s b u r g and Southwestern Petroleum Company, nor from any person for them any consideration whatsoever for the execution of a lease on the west 80 acres of my said allotment.

"I desire to state further that the lease executed by me in favor of William J. Anicker was executed in good faith in all respects, and for the consideration above set forth, and that at the time of the execution of said lease I believed and so stated to the said William J. Anicker and in the presence of other witnesses, that I had not executed any lease in favor of any person covering the west 80 acres of my said allotment, except the lease executed by me in favor of the Eastern Oil Company, covering my entire allotment.

"I therefore, request that the lease to the Eastern Oil Company be disapproved, for the reason that the same was not filed within the time required by the rules and regulations of the Secretary of the Interior for the approval of such l e a s e s, and that the purported lease to D a v i d Gunsburg and Southwestern Petroleum Company be disapproved for the reason that if the same appears to have been executed and acknowledged by me, and if the same was so executed and acknowledged by me, that my signature thereto was procured by false and fraudu-

lent representations, and that I believed I was only executing a lease covering the east 80 acres of my allotment, which lease was executed in favor of A. L. Funk and O. E. Riter.

EASTMAN RICHARD.

"Witness: H. Van Smith, Robert Fish.

"Subscribed and sworn to before me, a notary public in and for said county and state, this 12th day of April, 1912. (Seal) L. C. CLARK, Notary Public. My commission expires January 4, 1914."

At the hearing in the Department the defendants were represented by one "Roy E. Scales, Agent" (Rec. 100) who made common cause against Anicker with the counsel for the Indian. They questioned the Indian and sought to have him testify that he told Anicker that he had leased to defendants *but the Indian never could be brought so to testify* by their skilled and well directed examination.

The Indian testified (Rec. 101) that he told Robert Fish, who was Anicker's messenger who came to bring him to Anicker, that he had already leased the land and "I informed him I had already leased the land to one Roy Scales, there was two fellows but I forgot their names (witness points to Mr. Funk as being one of the men)." After testifying that he signed up the Anicker lease in Attorney Motter's office the Indian (Rec. 102) testified:

"There were so many papers for signature that my hand isn't rested since that time. After that of signing the papers they were going some other place, and we went to an attorney's office, and after we went to an attorney's office they went some other direction. We went to the commissioner's office and the Commissioner asked how the gentlemen got the lease, but this gentleman told the Commissioner they left the papers with the lease in the office and the Commissioner asked them if they paid any bonus and he replied, no, sir. The Commissioner told him he should pay or myself. We went back to the attorney's office and he paid me $50.00, and promised to pay me $400.00 and we were aiming to go back on the next train, but Robert said he had not got his pay and had to stay over, I told him I would go on."

It is very significant that when he went to the Commissioner's office and talked to the Commissioner (to the Five Civilized Tribes the representative of the Secretary of the Interior who first passes on these questions for the department, and who, more than any other person this side of Washington, is the guardian and protector and confidential adviser of these adult full-blood Indians), he made no complaint or mention of having already leased the property but accepted the Commissioner's assertion that "he should pay or myself."

Under the able and very leading examination of his own counsel the Indian testified:

"Q. Now, Eastman, when Mr. Anicker sent for you on March 20th to sign some papers you went to Muskogee? A. Yes, sir.

Q. Did you tell Mr. Anicker you had made a lease on this 160 acres of land to the Eastern Oil Company prior to that time? A. I made a lease to some one else.

Q. Did you tell him you made a lease to some one else? A. Yes, sir.

Q. Did you tell Mr. Anicker, or this person, in his office you had made a lease to that 160 acres of land also to Funk & Riter? A. There was two tracts of land of 80 acres each, and I had leased the whole 160 acres to this gentleman, Mr. Scales, Mr. Anicker said he would like to look into the matter.

Q. Mr. Anicker went over to the agency or somewhere to look into the record, did he? A. Probably so.

Q. Did you tell Mr. Anicker you had not made a lease on 80 acres of that land? A. No, sir.

Q. Did you tell Mr. Anicker you wanted to make a lease on 80 acres you had not leased? A. I told him I had it all leased.

Q. Did you tell Mr. Anicker you didn't think you could lease that because you had leased before? A. I told him I had leased, and he said he would look into it.

Q. You mean Mr. Anicker said he would look into it? A. Yes, sir.

Q. Did he leave the office and come back later? A. Yes, sir.

Q. Did he tell you he wanted a lease on your land any way? A. He said he could lease it again.

Q. Did Mr. Anicker tell you you could lease that land to him and you would not involve yourself in any difficulty? A. He didn't say.

Q. You had told Mr. Anicker you had already leased the land? A. Yes, sir.

Q. Did Mr. Anicker pay you $50.00? A. Yes, sir.

Q. Did he agree to pay you $400.00? A. Yes, sir.

Q. Did he offer you the other $350.00? A. No, sir.

Q. Was Mr. Motter present in that office at the time? A. There was a number of people in there, and I don't quite r e m e m b e r." (Rec. 103-4.)

"Q. Eastman when you gave that lease on those two 80 acres, before you gave the lease to Mr. Anicker, did you come up to the I n d i a n Agent's office. When you made those leases to Scales on those two 80 acre parts? A. Probably so, I don't know. Wouldn't know the Indian Agent if I was to see him.

Q. Did you understand you were making two leases on each 80 acres? A. I thought I was making 160 acres one lease.

Q. You thought y o u was giving 80 acres to Funk and 80 acres to Scales? A. Probably so, don't know; understood I was making just one lease.

Q. When you gave your name to Anicker, you advised him you had leased 160 acres to Scales? A. I told him that that land was already leased. Robert Fish heard me." (Rec. 105.)

"Q. Did you understand you were making a lease to anybody but Scales? A. Roy Scales spoke in Creek and I understood that I was making a lease to him.

Q. To Roy Scales? A. Yes, sir.

Q. You didn't understand you were making a lease to anybody but Roy Scales? A. Well, I said there were two persons and I thought that they got the lease.

Q. Was anything said to you about leasing the east 80 acres of the land to Funk? A. There was some talk of it. And there was some mention of the numbers of the land, but I don't know anything about the numbers.

Q. Didn't you understand when you signed those papers you had only leased the east 80? A. I thought I was leasing all of it." (Rec. 106-7.)

"Q. Did you tell Mr. Anicker that there was any other lease on the west 80 than the Eastern Oil Company lease, did you tell him that? A. I told them I had leased to these two fellows Funk and Scales.

Q. Did you mention Mr. Scales' name to Mr. Anicker at all? A. Told them I had leased to Scales. Didn't know the other fellow, but I did know Scales.

Q. Did you tell them you had leased the

whole 160 acres to Scales? A. I just told them I had leased the land.

Q. Did you mention Scales' name? A. Yes, sir, I named over Scales. I don't know any one but Roy Scales.

Q. When you took Mr. Anicker's $50.00 you knew all that land was leased? A. Yes, sir, both knew because I had told them." (Rec. 107).

"Q. Eastman you signed the declaration that has been filed here in the Indian Agent's office 18750 saying you had made this lease to Anicker in good faith in both, is that correct? (The interpreter here reads to the witness the affidavit marked Exhibit "B".) A. I signed a number of papers and I signed this one.

Q. Was it read over and explained to you? A. It was read but not made quite clear.

Q. Is it clear now? Do you still stick to it? A. Yes, I understand it. Before I say whether I stick to it or not, I want the question of the oil and gas lease that I signed, settled." (Rec. 109.)

Now as to the attitude of defendants. Though their lease was executed on March 20, 1912, *they did not pay the Indian a cent bonus* for it and made only a conditional deposit with the department of $80.00 on filing the lease in the department on April 5, 1912. Bear in mind, too, that the Eastern Oil Company previously had a lease on all 160 acres of this Indian's land then in bad standing because not filed within the 30 days of the departmental limita-

tion but which was feebly contesting in this many-cornered departmental fight; that all parties then, as now, regarded the Eastern Oil Company lease as practically dead; and that on the new leasing of the Indian's property Funk & Riter's lease to the east half of said NE4 of the section is not contested now, and let us examine the testimony of Mr. Roy E. Scales *who represented defendants* in the departmental contest:

"Q. What business are you in? A. In the oil business.

Q. How long have you been in the oil business? A. Four years.

Q. For yourself? A. No, sir; I am working for the Southwestern Petroleum Company and David Gunsburg, Buffalo, New York.

Q. Do you work on a salary? A. Part of the time and part of the time for myself. At the time this lease was taken I was working on a salary.

Q. What is the salary? A. $150.00 a month and expenses.

Q. How long were you employed on salary? A. Two months, for the Eastern Oil Company.

Q. Are you employed by any one else at this time? A. I am not.

Q. Were you at the time the lease was made to Gunsburg and the Southwestern Petroleum Company? A. I was not.

Q. Did you take more than one lease from this allottee, Eastman? A. I did.

Q. How many? A. I took Eastman's lease for Funk and I took a lease for the Eastern Oil Company on the inherited land of his wife.

Q. With reference to this allottee's land, this 160 acres, did you make a lease on the west and east 80? A. No, sir.

Q. Which 80? A. The west 80.

Q. Was Funk present? A. When I took it? Yes, sir.

Q. Who else? A. Boone and Lattimore.

Q. Were they all present? A. Butte was not in; Lattimore & Boone. My understanding is that Boone wrote up the lease.

Q. Who was present at the time the deal was closed? A. The deal was closed and I gave Mr. Boone my check, and I think the lease was written up here in the Department. I was not present.

Q. How much did you give a check for? A. $80.00.

Q. What for? A. 80 acres. $1.00 per acre.

Q. Who was the check payable to? A. Eastman Richard.

Q. Do you know whether or not he got the money? A. I don't know; I guess it is here on deposit.

Q. Was the money placed with the Department at the time the lease was filed? A. It was.

Q. How do you know it was? A. It was given to Boone.

Q. But it was not paid into the Department until it was filed, was it? A. Now as to

the exact date, my understanding was that Mr. Boone came over here to the department with the allottee, and I gave him my personal check and brought it over; what he did with it, I don't know.

Q. You don't know whether the allottee was paid it or not? A. The money was placed with the Department pending the approval of this lease, as there was another lease of record.

Q. *You yourself never paid Eastman anything?* A. *I never did.*

Q. *You do not know whether he has been paid anything?* A. *No, sir. The check was given to Boone to pay into the Department.*" (Rec. 90-1.)

It appears that the bonus which formed the consideration for defendants' lease was $80 (Rec. 80-81) *but* when it became $80 is not shown. The same Roy Scales who testified above made affidavit (p. 39) on April 4, 1912, which he filed on April 8th, with the lease papers to the effect that "the only bonus to be paid for the execution of said lease, directly or indirectly, by the lessee to the lessor or any one for him is $20 of which $20 has been paid and none payable." Which statement by this agent is correct, that when he made affidavit that the bonus was $20, or his testimony when he said it was $80? When did he jump his bid from $20 to $80? Certainly after Anicker's lease was filed.

This makes clear and conclusive the fact that the Indian never got a cent paid to him for the defendants' lease and that the defendants waited from March 20th, till at least April 5, 1912, fifteen days or more before depositing the money in the department. *They were speculating at the Indian's expense,* notwithstanding the developments were so rapid that the oil inspector reporting to the Commissioner on the adequacy of the bonus, reported that a fair bonus, on the 20th of March, the date of the defendants' lease, was $600.00, and on the 28th of March, the date of Anicker's lease, was $800, an increase of 33 1-3% in eight days. By withholding their payment of even the $80 until after Anicker's lease was filed they committed themselves to nothing and risked not a cent until the developments showed it was worth even more than on the date of Anicker's lease. The rapidity of development was stated by Mr. Lattimore at the examination in his statement (p. 98) as follows:

> "By Mr. Lattimore: We object to a continuance so far as the Eastern Oil Company is concerned for any length of time whatever. I understand the facts to be there is a well drilling from a quarter or half mile from this land, which is due in within ten days and the well may be condemned or prove very productive within that time and it is to the advantage of the Indian as well as everybody else that this matter be pushed through.

By Mr. Tabor: We wish to enter the same statement for the allottee."

The alignment of the parties then and now is noteworthy as explanatory of the testimony of the Indian as well as defendants' attitude. At the hearing in the department the appearances were:

"Eastern Oil Company, represented by Butte, Boone and Lattimore, by Mr. Lattimore, with prior consent of Gunsburg and Southwestern Petroleum Company.

A. L. Funk & O. E. Riter, by A. J. Ward, attorney.

David Gunsburg & Foreman, by Roy E. Scales, agent.

Wm. J. Anicker, by Roach & Bradley, attorneys, by Mr. Bradley.

Eastman Richard, by Lucas & Tabor, attorneys, by Mr. Tabor.

D. C. Morrison, oil inspector, Union Agency." (Rec. 88.)

In Mr. Scales' testimony above quoted it appears that *he took* the lease from the Indian for the Eastern Oil Company on some of the Indian's land and that he worked for the Eastern Oil Company for two months. It is nowhere stated that anyone else took the lease from the Indian on this contested land though it is universally admitted that company had one, and *the fair inference is that Roy Scales was*

the party who took it. If that is so it abundantly explains the testimony of the Indian and renders it incapable of being construed against Anicker. The Indian does not pretend that he told Anicker or his messenger, Fish (whose knowledge would not bind Anicker), that he had leased to defendants, Gunsburg and the Southwestern Petroleum Company and it cannot be construed as going beyond that he told Anicker that he (Richard) had l e a s e d it to Roy Scales. He did lease to Roy Scales for the Eastern Oil Company by the lease which was discredited at the hearing and there is not the slightest hint that Anicker was informed of any but said lease to Roy Scales and not the slightest hint that he informed Anicker of the making of any lease to defendants, Gunsburg and the Southwestern Petroleum Company. When Anicker and his attorney Motter investigated the records and found the Eastern Oil Company lease which was, no doubt, the Roy Scales lease, and found none other, they were amply justified in relying on the fact that none other than the discredited Eastern Oil Company lease taken by Roy Scales, was in existence.

Counsel for defendants below made the point that as Roy Scales was agent for defendants, Anicker could have inquired of Scales and found out about defendants' lease. How clear and ingenious! How was Anicker to know Scales had a lease in his pocket

to ask about? The lease of defendants was not then on file, either in Union Agency or the county office. There was nothing on record to indicate that Agent Roy Scales had any lease except, as the fair inference would be, that he appears as agent of record who procured the discredited Eastern Oil Company lease. Must Anicker suspect that the agent of a lease on record *in bad standing* is also agent for a conflicting *(?)* lease to some other party? Are we to assume that Mr. Scales is agent getting leases for different clients to the same land, and charge Anicker who was ignorant thereof, with negligence at not suspecting such dubious and inconsistent service by this facile agent?

We submit that the true view should be that Anicker, who took his lease *and paid his money* in good faith in March before the filing in the department March 30, 1912, should be deemed an original purchaser or taker at that time, and that defendants, who took papers binding them to nothing and withheld even their conditional deposit until April 5th and paid not a cent until that date, should be considered as purchasers of the lease only on the day they paid their money and *that they are junior to Anicker in point of time of date of contract as well as of recording.*

We therefore submit that not only was the finding by the department that Anicker was a taker in

good faith "entitled to that advantage" of priority of filing, but *the strong preponderance of evidence before the department required such a finding*, and that the departmental conclusion of fact was free of gross error, and, that the trial court's view reversing the departmental conclusion of fact was itself a gross error.

In their brief below defendants tried to convey the impression that the plaintiff originally contended he was a *bona fide* purchaser and later abandoned that contention; but if the defendants mean to convey such an impression it is quite foreign to the fact.

The plaintiff's original petition stated that the plaintiff was a *bona fide* purchaser, upon the idea that a statement of good faith was a proper allegation to show the plaintiff's case. The defendants pounced upon that allegation as an excuse for opening up the Departmental proceeding on the facts. The Department's decision was based upon an error of *law*, upon facts decided by the Department, and we have no quarrel with the Departmental decision *on the facts*. We know the Departmental decision on the facts is binding, and we merely complain of the Departmental error of law, which is revisable. The defendants doubtless realized that the decision of the Department on the law was indeed erroneous, and that they must inevitably lose on that issue, and *they*

sought to change the suit from one to revise a decision of law to a controversy over a question of fact. We merely sought to checkmate the attempt to inject an issue of fact into the case, by striking out the allegation, *as an issuable allegation*, that Anicker was a *bona fide* purchaser, and standing on the finding of the Department that he was a *bona fide* purchaser.

The effect of our amendment was to stick to the question of law upon which our suit is predicated, and to leave out any controversy over the facts either in the Department or this suit.

It is not true, as contended by defendants below, that "this record discloses that the plaintiff's lease would have been disapproved without any opposition or competition upon the part of the defendants."

It is utterly immaterial in this case to consider the status of the Eastern Oil Company as referred to by the defendants. The Eastern Oil Company waited long after the expiration of thirty days and clearly speculated before they sought to have their unapproved lease reinstated. It was in bad standing in the Department, of no validity except the inchoate validity of its original execution but which could never under any aspect be expected to ripen into an absolute validity.

Both sides admitted that, and the Secretary has ruled it, and the Eastern Oil Company is not a party to this cause. There was no specific issue presented in the department with reference to the good faith of Anicker. There was an issue as to good faith of the *defendants* and also an issue as to the *good faith of the Indian in practicing deception upon Anicker.* We quote from the Superintendent's report (Rec. 47-8):

> "But it is contended on behalf of Mr. Anicker that the lease to Gunsburg and the Southwestern Petroleum Company was obtained by fraud. To this contention I cannot agree for the reason * * * etc."

Notwithstanding the Indian did not corroborate Anicker in his contention that the Indian had deceived Anicker, no corroboration was needed, because the clear presumption was with Anicker by reason of his prior filing. (Authorities on pages 73-77 of this brief.)

Beside this the Superintendent regarded the Indian as "vacillating and inconsistent" (Rec. 44), a polite way of expressing his view that the many conflicts in testimony by the Indian indicated how worthless the Indian's testimony was.

The Secretary pretermits a determination of the question whether the Indian deceived Anicker, but *nowhere does he hint even in the slightest degree*

any suggestion of bad faith by Anicker nor the existence of evidence from which the same might be inferred.

The Secretary admits (Rec. 48) for the sake of his conclusions that Anicker, the lessee, was misled by the Indian lessor, and he also says (Rec. 50), "The lease of Mr. Anicker must also be disapproved, *not because he was in any way delinquent himself, but because of the prior lease of David Gunsburg.* * * *"

Hereinabove we cite authority on the question "Who is a *bona fide* purchaser" and on the presumptions and principles applicable to that question. We also go into the evidence at length which shows by a very strong preponderance that Anicker was a *bona fide* purchaser without knowledge of defendants' lease. We do not consider that the evidence before the Department has any proper place in the case at all, because this inquiry into the Departmental decision is only with reference to his decision on the law; but as the evidence was admitted over our objection, we state the case on this point as it reaches this court.

The evidence was gotten into this record only by the thin subterfuge of an amendment to the defendants' answer and the making of an assault *by the defendants* on the Secretary's decision *upon the facts.* The evidence utterly fails to show a gross

mistake of fact by the Secretary in treating Anicker as a *bona fide purchaser,* and *unless it does show a gross mistake of fact there is no warrant for going into the testimony at all.*

In order to show that Anicker had knowledge of the lease, they must bring it home to him by some definite information of it or by something that reasonably charges him with further inquiry. The utmost aspect favorable to defendants that the evidence shows, is that the Indian told Anicker he had made a lease covering the entire 160 acres *to Roy Scales.* No lease *to Roy Scales has ever been brought to light,* and the old, discredited lease to the Eastern Oil Company *for whom Scales worked,* is by fair inference the lease the Indian meant.

In their brief below the defendants said: "If the courts have authority to go into the action of the Secretary, and review it, then the court must go into the whole record before the Secretary and try the case *de novo.*" We dispute this broad assertion, and assert with confidence that when only the legal aspect of the Secretary's decision is involved we are concerned only *with the record* and the legal aspect of the decision; but when the decision is challenged for gross mistake of fact, then *on that challenge and on that only,* can we go into the testimony underlying the decision of the Secretary on the facts.

We have complained of the Secretary's action in making an erroneous decision of law, and upon that complaint *and upon the record only without the testimony behind the record* (see *James* v. *Germania Iron Co.*, 46 C. C. A. 476, 107 Fed. 610), we must stand or fall. The defendants are not keen to have the question of law decided, and if they cannot choke us off entirely by their argument on the jurisdiction, they want the bars thrown down so as to go into the whole case *de novo*.

They differ with the court holding, in the case of *James* v. *Germania Iron Co.*, *supra*, from which we have quoted, that the testimony is not part of *the record* of the case before the Secretary. We assert confidently that *upon our challenge of the correctness of the Secretary's decision on the law, only the record without the testimony can be examined.* On the *defendants'* challenge of the correctness of the Secretary's decision on the facts the testimony underlying the Secretary's decision may be looked to, but the burden is on defendants, under their challenge, to *first allege* and then convince the court that there was a gross mistake of fact made by the Secretary.

Defendants said in their brief below: "We have never thought it necessary to go into the testimony before the Department, because neither the Secretary nor any subordinate officer found as a fact that plaintiff was a *bona fide purchaser.*" In the light of

this latest declaration must we accept the strenuous effort to get the testimony into the record and the adoption of the extraordinary expedient of making it an exhibit to an amendment to a pleading (Rec. 77), purely in a Pickwickian sense?

The defendants claim that it is not right for us to impute to the Secretary that he decided the *bona fides* of Anicker favorable to Anicker. Yet they say that the Secretary did *not* decide any such fact, and because he did not decide it the court must impute to the Secretary a decision favorable to the defendants on that or some other unstated ground to justify his ultimate decision on the whole case.

If the defendants' theory be true we strike down at one blow all the jurisdiction of the equity court to correct errors of law by the Secretary even in cases where the courts now have jurisdiction. Just let the Secretary base his opinion on the law alone, and no matter whether the law be decided correctly or incorrectly, we must wave the whole matter aside, because, having pretermitted any decision on the facts, we must *presume* that he decided in favor of the victorious party *on the facts*, in such way as to support his ultimate decision, and therefore we have a case where the question of facts cannot be reviewed in the courts.

Much of the defendants' brief below was devoted to quoting parts of the testimony before the Depart-

ment which the defendants contend shows notice to Anicker in a more or less circumstantial way. We contend that it does not. If the question of Anicker's *bona fides* be deemed open in this case, we assume that the court will read the record for itself, and we content ourselves with that assumption without repeating large portions of the record.

Defendants laid great stress upon the phase of the case of *Shulthis* v. *McDougal*, C. C. A. 170 Fed. 529, which discusses the question of *bona fides* and notice. They quote from that case thus:

> "If Berryhill (meaning the lessor) in fact told the McKays the name of the parties *to whom he had executed the papers*, they of course could not have accepted his statement that the papers were i n v a l i d, but w o u l d have been charged with the duty of consulting *the other parties to the transaction*, and ascertaining from them the nature and extent *of their rights*. Failure to do so would have impressed the land in their hands with all the rights of those parties."

If the Indian had told Anicker the names of the other *parties to the lease*, Anicker would doubtless have been under the d u t y at his peril of consulting such other party, but the Indian *did not tell Anicker the name of the lessee, but told him the name of Roy Scales, so they contend, who was not the lessee at all.*

There is no evidence that Anicker knew Roy

Scales or ever heard of him before the execution of the Anicker lease.

It subsequently appears that Scales lives in Tulsa (Rec. 85) while Anicker lives in Muskogee. If they live in separate places, they are most probably strangers to each other, and there is no evidence that Anicker ever heard of Scales before, or knew his address; how could he consult Scales about the matter?

Even if we concede, for argument's sake, that Anicker must have taken the risk of a *lease to Scales* because the Indian told him he *had executed one to Scales*, Anicker is certainly not chargeable with negligently failing to know what Scales might tell, when he never heard of Scales before and has not even a remote idea as to how to find him.

The only evidence of prior employment or location of Scales is his own testimony to the effect that he was in the employ of the Eastern Oil Company who held the old discredited lease. Even if Anicker knew of Scales' prior connection with the Eastern Oil Company, such fact was calculated to allay suspicion rather than call for inquiry, because the natural inference in Anicker's mind would be that the Indian had reference to the old lease to the Eastern Oil Company whom Scales represented.

This inference is supported by the affidavit made by the Indian lessor on April 12th after both the leases in controversy had been filed in the depart-

ment, after Anicker learned of the defendants' lease; the lessor was asked in regard to it and he made the affidavit found on pages 115-117 of the record, a portion of which we quote:

> "I desire to state further that the lease executed by me in favor of William J. Anicker was executed in good faith in all respects, and for the consideration above set forth, and that at the time of the execution of said lease I believed and so stated to the said William J. Anicker and in the presence of other witnesses, that I had not executed any lease in favor of any person covering the west eighty acres of my said allotment, except the lease executed by me in favor of the Eastern Oil Company covering my entire allotment."

In the case of *Daniels* v. *Wagner*, 237 U. S. 547-567, 59 L. ed. 1102, the defendants, like the defendants in the case at bar, being confronted with the error of law committed by the Department in the Departmental decision, the error of law being that point upon which the Departmental decision turned, sought to have the case affirmed in the court on the ground that the point of law on which the Departmental decision turned was not the only point in the case and that there were other points in the case relating to the facts that might justify the decision. In answer to that contention this court said:

> "There being, then, no basis for the assumption of a discretionary power on the part of the

Land Department upon which the lieu land entry or entries were finally rejected and the land awarded to other entrymen who were later in time, the bill stated a cause of action sustaining the relief prayed unless the demurrer was rightly maintained for some other reason. And for the purpose of considering that subject we state under one heading the questions involved in its solution.

"From the point of view that it is established that error of law was committed by the Land Department in assuming that it had a discretion to reject the lieu entry, is its action nevertheless sustainable because of the suggestion made by the court below in closing its opinion, or for any other fact or reason pressed in argument?"

This court ruled against that contention of the defendant and the cause was reversed because the bill stated a cause of action and the demurrer thereto was improperly sustained. We therefore submit that the *Daniels-Wagner* case is authority requiring the reversal of this case because the fundamental error of the trial court was that the petition of the complainant, Anicker, did not state a cause of action. It is true that in the *Daniels-Wagner* case the ruling was based entirely on the demurrer without a hearing on the merits. In the case at bar there was a final decree on the bill and answer. (See record page 128). It will be noted that in the case at bar the answer admitted all the *facts* and Departmental *pro-*

ceedings stated in the decision but it merely differs in the legal conclusions with reference thereto. When the pleadings in the case at bar are rightly interpreted it will be seen that it is not substantially distinguishable from the *Daniels-Wagner* case which was decided only on demurrer.

(2) *Defendants were trustees for plaintiff.*

When the Department improperly decides in favor of one party and against another, through error of law or mistake of fact, courts of equity may correct the error by declaring the one a trustee for the other. (*Wallace* v. *Adams*, 74 C. C. A. 540, 143 Fed. 721; *Johnson* v. *Towsley*, 13 Wall. 72-91, 20 L. ed. 485; *Hawley* v. *Diller*, 178 U. S. 476, 44 L. ed. 1175, 1162; *Germania Iron Co.* v. *James*, 32 C. C. A. 348, 89 Fed. 816-7; *Bogan* v. *Mortgage Co.* 11 C. C. A. 128, 63 Fed. 193; *James* v. *Germania Iron Co.*, 46 C. C. A. 476, 107 Fed. 597; *Moore* v. *Robins*, 96 U. S. 530, 24 L. ed. 851; *So. Pac. R. R.* v. *Dull*, 22 Fed. 500; *Garrett* v. *Walcott*, 25 Okla. 582, 106 Pac. 848; *Ross* v. *Stewart*, 25 Okla. 617, 106 Pac. 870; *Leak* v. *Joslyn*, 20 Okla. 200, 94 Pac. 518; *Robinson* v. *Owen*, 119 Pac. 995, 30 Okla. 484; *Summers* v. *Barks*, 36 Okla. 337, 127 Pac. 402.)

In *Southern Pac. R. R. Co.* v. *Dull*, 22 Fed. 500, Judge SAWYER quoting from *Johnson* v. *Towsley*, 13 Wall. 87-8, said:

> "The Secretary, or r a t h e r the assistant secretary, as appears by the record, rejected Towsley's claim on the sole ground that he had previously filed a declaratory statement of his intention to claim a pre-emption of another tract of land which he had voluntarily abandoned; and it is clear that, but for this construction of the statute on that subject, Towsley would have received the patent which was awarded to Johnson."

That is a practically exact parallel with the case at bar. In the case at bar the assistant secretary decided the question on the erroneous legal theory that the departmental regulation called the "30-day rule" suspended the recording statutes. The a s s i s t a n t secretary said in his opinion: "*If there were any advantage in the prior filing of a lease, both having been filed at the Agency within the time required by regulation, Anicker would have that advantage.*"

This clearly and unmistakably declares that if the Secretary shared our view of the *law* he would have decided for Anicker.

IV.

Sixth Assignment of Error.

This assignment complains of the decree of the court against complainant Anicker in that the court refused to give Anicker the benefit of the recording

laws, by holding in effect that the recording laws do not apply.

By act of February 19, 1903, Congress extended the recording laws of Arkansas to the Indian Territory, as follows:

> "*An act providing for record of deeds and other conveyances and instruments of writing in Indian Territory, and for other purposes.*
>
> "*(Record of Deeds, etc.—Laws of Arkansas extended—Clerks ex officio recorders.)* That chapter twenty-seven of the Digest of the Statutes of Arkansas, known as Mansfield's Digest of eighteen hundred and eighty-four, is hereby extended to the Indian Territory, so far as the same may be applicable and not inconsistent with any law of Congress: *Provided*, That the clerk or deputy clerk of the United States Court of each of the courts of said Territory shall be ex officio recorder for his district and perform the duties required of recorder in the chapter aforesaid, and use the seal of such office at the office of said clerk or deputy clerk (32 Stat. L. 341.)"
>
> —10 Fed. Stat. Ann. 130.

There being a possible doubt that this applied to Indians, on April 28, 1904, Congress enacted as follows (33 Stat. L. 573):

> "All the laws of Arkansas heretofore put in force in the Indian Territory are h e r e b y continued and extended in their operation, so as to

embrace all persons and estates in said Territory, whether Indian, freedmen, or otherwise, and full and complete jurisdiction is hereby conferred upon the District Courts in said Territory in the settlement of all estates of decedents, the guardianships of minors and incompetents, whether Indians, freedmen, or otherwise. That the sum of twenty thousand dollars is hereby appropriated, out of any money in the Treasury not otherwise appropriated, for the payment of salaries of the judges hereby authorized, the same to be immediately available."

To make sure that the erection of the state in no wise militated against the force of these laws as applied to Indians, the Enabling Act provides as follows:

"SEC. 1. *Admission of Oklahoma and Indian Territory as State.* That the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma, and the Indian Territory, as at present described, may adopt a constitution and become the State of Oklahoma, as hereinafter provided; *Provided*, that nothing contained in the said constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights by treaties, agreement, law or otherwise,

which it would have been competent to make if this Act had never been passed. (34 Stat. L. 267.)"

—Sec. 1, page 49, Snyder Code.

This was further emphasized by the last few lines of section 21 of the Enabling Act, as follows:

> "And all laws in force in the Territory of Oklahoma at the time of the admission of said state into the Union shall be in force throughout said state except as modified or changed by this act or by the constitution of the state, and the laws of the United States not locally inapplicable shall have the same force and effect within said state as elsewhere within the United States (34 Stat. L. 277)."

It was expressly decided (*Ex parte Charley Webb*, 225 U. S. 663, 56 L. ed. 1248,) here that the effect of the Enabling Act was to preserve the existence of then existing legislation pertaining to Indians and that the express reservation of power on the part of Congress to legislate in the future did not imply any purpose to wipe out then existing legislation. The decision is epitomized in the second head note which reads:

> "2. An intention to repeal the existing federal laws and regulations respecting the Indians cannot be gathered from the *proviso* in the Oklahoma Enabling Act of June 16, 1906 (34 Stat. L. 267, chap. 3335), par. 1, reserving to the

> Government of the United States the authority to make laws and regulations in the future respecting such Indians."

The decision of the Departmental officials in this case holds that the time of the execution of the lease controls, notwithstanding the holder of the prior lease may have failed to comply with the law with reference to putting the same to record. Reduced to its last analysis his holding is that the rules and regulations of the Department take precedence over and are to be enforced notwithstanding an Act of Congress makes an exactly opposite course of conduct necessary.

Section 2 of the Regulations of April 20, 1908, provides as follows:

> "All leases shall be in quadruplicate and, with the papers required, *shall be filed* within thirty days from and after date of execution by the l e s s o r, with the United S t a t e s Indian Agent at Union Agency, Muskogee, Oklahoma."

The Indian Superintendent construes this to mean not only that a lessee has the right to withhold filing a lease for thirty days after its date, but that he may do so and take no risk, even if an innocent purchaser for value acquires an interest in the same land while he refrains from filing his lease. The official idea is that this regulation was not intended for the mere purpose of permitting a lessee to file a lease

within thirty days after its execution and still not have it fall under the ban of the Department, but that the proper construction of the rule goes to the further extent that for the period of thirty days any other person taking a lease covering the land of an allottee does so *at his peril*. Reflection upon this construction will indicate to the ordinary mind the injustice of this doctrine. Recording offices are created the country over for the purpose of protecting innocent purchasers in their rights. If the Indian Superintendent's decision in this case is right let us see, for illustration, what the practical operation of that rule will be.

Suppose A agrees to make a lease upon B's allotment. B represents to him that there are no leases upon said land. A, being a prudent man, does not depend upon the representation of B, but goes himself to the recording office of the county in which the land is situate and makes careful investigation and does not find upon file in that office any lease or other conveyance of this land. He then investigates at the office of the Indian Superintendent and finds nothing on file indicating that any lease has been made upon the land. Therefore, being still prudent, he makes investigation as to what the requirements of the law are with reference to persons who buy leases, respecting their own rights and the rights of other persons who may desire to purchase. He finds that

Congress, by an act approved April 26, 1906 (34 Stat. L. 137), has made the following provision:

> "*Sec. 20.* That after the approval of this act all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads, of full-blood allottees of the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribes shall be in writing and subject to approval of the Secretary of the Interior and shall be absolutely void and of no effect without such approval; *Provided*, That allotments of minors and incompetents may be rented or leased under order of the proper court; *Provided further, That all leases entered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory.*"

The law applicable to recording instruments which this Act of Congress made effective as to leases is to be found in Mansfield's Digest of the Statutes of Arkansas of 1884, page 281, sections 670 and 671, as follows:

> "*Sec. 670.* Every deed, bond, or instrument of writing, affecting the title in law or equity to any property, real or personal, within this state, which is or may be required by law to be acknowledged or proved and recorded, shall be constructive notice to all persons from the time the same is filed for record in the office of the recorder of the proper county; and it shall

be the duty of such recorder to indorse, on every such deed, bond, or instrument, the precise time when the same is filed for record in his office."

"*Sec. 671.* No deed, bond, or instrument of writing, for the conveyance of any real estate, or by which the title thereto may be affected in law or equity, hereafter made or executed, shall be good or valid against a subsequent purchaser of such real estate for a valuable consideration, without actual notice thereof; or against any creditor of the person executing such deed, bond, or instrument, obtaining a judgment or decree, which by law may be a lien upon such real estate, unless such deed, bond or instrument, duly executed and acknowledged, or approved, as is or may be required by law, shall be filed for record in the office of the clerk and ex officio recorder of the county where such real estate may be situated."

It may be contended that section 20, of the Act of April 26, 1906, above quoted, is not applicable at the present time because it only applied to the Indian Territory and it may be further contended that it is not the proper statutory construction to write in the words "State of Oklahoma" where the words "Indian Territory" appear at the end of section 20. Our view of the law is that this section, not having been repealed, is still in force and that a reasonable interpretation of the statute is to read, where the words "Indian Territory" occur at the end of said section, the words "State of Oklahoma."

Our reason for saying that this statute is still in force as to Indians is this: By the Act of Congress of February 19, 1903 (32 Stat. L. 841), Congress extended the Registration Law of Arkansas, being chapter 27 of Mansfield's Digest, to the Indian Territory and put in force sections 670 and 671, above quoted, as to the Indian Territory generally. So that you would have to impute to Congress a perfectly futile and idle purpose in passing the Act of April 26, 1906, above quoted, if the same was not enacted for the specific purpose of being applicable to *Indians alone*. This being true, this statute falls within the limitation put upon the state by the Enabling Act with reference to certain laws which still remained in force.

Assuming, however, for the sake of the argument alone that such is not the case, further investigation develops that the Act of Congress known as the Enabling Act and under which Act of Congress the Territories of Oklahoma Territory and Indian Territory were constructed into the State of Oklahoma, contains the following provision:

We quote from section 21 of the Enabling Act (34 Stat. L. 278) and only quote the concluding part of said section, as follows:

> "And all laws in force in the Territory of Oklahoma at the time of the admission of said state into the Union shall be in force throughout

said state, except as modified or changed by this act or by the constitution of the state, and the laws of the United States not locally inapplicable shall have the same force and effect within said state as elsewhere within the United States."

This act put in force and made applicable to conveyances of the character of the one at issue in this case, Sec. 1195, Snyder's Compiled Laws of Oklahoma of 1909, p. 416, which is as follows:

"SEC. *1195. Valid against third persons only when recorded.*—Except as herein provided, no acknowledgment or recording shall be necessary to the validity of any deed, mortgage, or contract relating to real estate as between the parties thereto; but no deed, mortgage, contract, bond, lease, or other instrument relating to real estate, other than a lease for a period not exceeding one year and accompanied by actual possession, shall be valid as against third persons unless acknowledged and recorded as herein provided: except actual notice to such third persons shall be equivalent to due acknowledgment and recording."

Section 2, of the Schedule to the Constitution of Oklahoma (See Snyder's Compiled Laws of Oklahoma of 1909, p. 137) is as follows:

"All laws in force in the Territory of Oklahoma at the time of the admission of the state into the Union which are not repugnant to this constitution and which are not locally in appli-

> cable shall be extended to and remain in force in the State of Oklahoma until they expire by their own limitation or are altered or repealed by law."

Having investigated thus fully, A finds that by Acts of Congress and by the organic law of the State of Oklahoma, that if B has made a conveyance of the lands proposed to be conveyed to him to any other person, that that person, having failed to put the conveyance which he may have received to record, he will be safe in purchasing the lease from B.

Further investigation discovers the Act of Congress of March 1, 1907 (35 Stat. L. 1015), which enactment is as follows:

> "The filing heretofore or hereafter of any lease in the office of the United States Indian Agent, Union Agency, Muskogee, Indian Territory, shall be deemed constructive notice."

Under the acts first above quoted, it is clearly the duty of the lessee to put his conveyance to record if he desires to hold under the lease against all persons whomsoever.

The subsequent Act of March 1, 1907, not only does not repeal the Act of April 26, 1906, and render nugatory the subsequent Enabling Act, but was undoubtedly intended and designed for the purpose of affording an additional means of notice to persons

engaged in the leasing of Indian allotments for all purposes. That law provides that the filing shall be constructive notice and does not say that the filing shall have effect *before the filing to impart notice.*

In the case of *Shulthis* v. *McDougal et al.*, decided by the Circuit Court of Appeals for the Eighth Circuit, June 3, 1909, and reported in 95 C. C. A. 615, 170 Fed. Rep. 529, this question is very fully discussed at pages 535-7 Fed. Rep.

In that case, on March 24, 1906, one Berryhill made a Departmental lease to Shulthis. Prior to the date that Shulthis put the lease to record Berryhill sold the fee to the land covered by the lease. The question which came before the court was whether or not the conveyance of the land in fee was subject to the prior, but unrecorded lease of Berryhill to Shulthis. The determination of this question hinged upon whether or not the lease was such a one as could and ought to be put to record under the laws in force in the then Indian Territory, and whether the lease would fail because McKay was a subsequent purchaser for a valuable consideration without notice. Upon this the court held that *the lease was the proper subject for recording even prior to its approval by the Secretary of the Interior*, and that Shulthis' failure to place the same upon record destroyed it as against the deed of the subsequent purchaser for a valuable consideration without notice, and this trans-

action occurred on March 24, 1906, which was prior to the passage of the act first above quoted which was approved by the President on April 26, 1906.

We do not dispute in any sense the plenary power of the Secretary of the Interior to make and promulgate rules and regulations for the leasing of the lands of Indians who are still under the supervisory control of the Secretary—*so long as those rules and regulations are not in conflict with laws of the United States.*

The situation here presented is this: The Act of Congress of April 26, 1906, provides that all leases of "fullbloods" for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory. That law has never been repealed but by the terms of the Enabling Act (34 Stat. L. 277-8) was continued in full force and effect. The Secretary of the Interior promulgates a regulation which says:

> "All leases shall be in quadruplicate and with the papers required shall be filed within thirty days from and after date of execution by the lessor, with the United States Indian Agent at Union Agency, Muskogee, Oklahoma."

The decision of the Indian Superintendent is in effect a holding that this regulation, just quoted, repeals the Acts of Congress of April 26, 1906, and the

Enabling Act, requiring said instruments to be recorded. If the regulation does not repeal them by implication (and a regulation of the Department cannot repeal an Act of Congress), then the failure to record, as provided in the Acts of Congress, defeats the rights of Gunsburg and the Southwestern Petroleum Company to this land under their lease. If these Acts of Congress are not repealed by this regulation, then Anicker, being a purchaser for value, without notice, under all the decisions and especially the decision in the *Shulthis* case above cited, is entitled to the land in controversy—covered by this lease. See also, *Morrill et al.* v. *Jones*, 106 U. S. 466, 27 Law ed. 267, and *U. S.* v. *Murrau*, 181 Fed. Rep. 723.

In *Lomax* v. *Pickering*, 173 U. S. 26 (on a writ of error to the Supreme Court of Illinois), the construction of an Illinois statute, much less comprehensive than ours, touching the subject of Registration, was involved, and registration of a deed was held to be necessary, even prior to its being approved by the President of the United States, to make it effective as against a subsequent purchaser without notice. In that case it was said:

> "even if this is not a construction of the state statute binding upon us, and decisive of the case, we regard it as a correct exposition of the law."

That rule would obtain in this jurisdiction even in the absence of enactments by Congress, but with

these enactments, which are still in force in this jurisdiction, requiring the recording of such instruments as the ones involved in this controversy, it seems to us that there is little room for argument and that the statement of the proposition is its own argument. It is this: We have a law of Congress requiring that this instrument shall be recorded in conformity with the law applicable to the recording of instruments now in force in this jurisdiction. The law of this jurisdiction with reference to the recording of instruments of this character is found in Snyder's Compiled Laws of Oklahoma of 1909, page 416, and is as follows:

> "SEC. 1195. *Valid against third persons only when recorded.*—Except as herein provided, no acknowledgment or recording shall be necessary to the validity of any deed, mortgage, or contract relating to real estate as between the parties thereto; but no deed, mortgage, contract, bond, lease, or other instrument relating to real estate, other than a lease for a period not exceeding one year and accompanied by actual possession, shall be valid as against third persons unless acknowledged and recorded as herein provided; except actual notice to such third persons shall be equivalent to due acknowledgment and recording."

Or it is sections 670-1 of Mansfield's Digest, hereinabove quoted, and we think it a matter of in difference which one is considered to be the law.

Against these Acts of Congress, and setting them aside as in effect having been repealed, is the following regulation of the Secretary of the Interior:

> "All leases shall be in quadruplicate and with the papers required shall be filed within thirty days from and after date of execution by the lessor, with the United States Indian Agent at Union Agency, Muskogee, Oklahoma,"

which the Indian Superintendent construes as making unnecessary the recording required by the Act of Congress and he was affirmed by his superior departmental officer.

In sustaining the decision of the Superintendent the Secretary (Rec. 52) said: "The rule of practice is that among competing leases, duly filed in compliance with the rule, the lease first executed shall be accepted; *i. e.*, the date of execution governs."

The rule of practice referred to is not supported by any citation of departmental decisions. Naturally the departmental practice has been to give official recognition to leases filed at any time within thirty days where no conflicting leases challenged the propriety of waiting for almost the whole thirty days. No citation was made of any case of conflicting leases wherein the question of the recording laws was involved. Whatever may have been the practice in cases of contested leases not involving the recording laws, whenever a case arises involving the recordin-

laws in force by congressional enactment, the departmental practice and interpretation of regulations must be brought into harmony with the law. If the departmental "practice" runs counter to the laws put into force by Congress, the practice must fall.

This court, in a recent case, *Waskey* v. *Chambers*, 224 U. S. 564, 597, 56 L. ed. 888, had before it the question of the registration of a mining lease. The cause of action arose in Alaska and was here on a writ of *certiorari* to the Circuit Court of Appeals for the Ninth Circuit. The controversy in that case arose over conflicting conveyances, deeds and leases, and the Circuit Court of Appeals held against a lease which was taken subsequently to an unrecorded deed on the ground that the lease created only a chattel interest, and was not a conveyance and therefore was not within the protection of the statute requiring registration. The Act of Congress in question in that case reads:

> "Every conveyance of real property within the district, hereafter made, which shall not be filed for record as provided in this chapter, shall be void against any subsequent innocent purchaser in good faith and for a valuable consideration of the same real property, or any portion thereof, whose conveyance shall be first duly recorded."

This court, in passing on the question, employed the following language:

> "But it is obvious that in principle the right of a lessee is the same as that of a purchaser in fee, and it would be a great misfortune, especially to mining interests, if a man taking a lease from those whom the record showed and he believed to be the owners, were liable, after spending large sums of money on the faith of it, to be turned out by an undisclosed claimant, on the strength of an unrecorded deed. We find no words in the statute that require such a result. On the contrary, the word 'conveyance' is defined, although for other purposes, as embracing every written instrument except a will by which any interest in lands is created."

We cite this case and quote from it mainly for the purpose of showing the view of this court, as to the importance of registration laws and their enforcement.

What means the statute that the filing in the Indian Agency is notice? Unrestricted Indians have nothing to do with the Indian Agency. They are free and have no guardianship over them. It has reference therefore, chiefly, and perhaps exclusively, to restricted Indians. Regulations already required leases to be filed for approval when made by restricted Indians and it is physically impossible *to file for approval without filing, and any filing imparts notice.*

Defendant's theory annihilates the doctrine of relation. The lease has inchoate validity and its approval relates back to its making. They say it has no validity until the moment of approval, which is out of harmony with the decisions. The Secretary, in the exercise of sound judicial discretion, may declare it improvident and therefore in a legal sense a fraud on the restricted and theoretically helpless Indian; so may a court of equity declare fraudulent and destroy a contract between white persons; but in either case the lease was valid until avoided. The only sensible, and perhaps possible, field of operation for the statute is to apply it to restricted Indians only. As thus applied it means that filing before approval shall impart notice. Being filed for approval imparts notice without being filed over again for the purpose of notice. If no rights can accrue before approval, that could be impaired by notice, what is the sense in the statute?

The only logical interpretation is that before approval a lease is inchoately valid and that there may be relative priorities among unapproved leases with the paramount right in the Secretary of the Interior to annul any, by disapproval, that may be improvident, and that the Anicker lease, being identical in terms with the conflicting lease (the terms of which are approved as not improvident) may and should prevail over it by reason of the filing statutes.

It is perfectly plain that the Secretary and his advisor, the Superintendent, both decided *the law of this case to be* that regardless of the recording law, thirty days was allowed in which to file leases. The Superintendent decided that the 30-day rule was a "*benefit or privilege*" of taking the time allowed (Rec. 50), which is a curious view considering the Secretary's abhorrence of improper speculation at the expense of the Indian, especially in the following paragraph of his opinion (Rec. 47):

> "If the contention of the Eastern Oil Company were sustained it would open the door to speculators who could, for one reason or another, hold leases in their possession, delay completion of same, and at the same time keep the land incumbered, thus depriving the lessor of his right to make a better lease if subsequent development in the vicinity of his land makes it of greater value for oil and gas mining purposes."

It would seem from this that within the Superintendent's view it is quite proper to give speculators the privilege of speculating at the expense of the Indian *for not exceeding 30 days*, while it will be *evil to allow it for any period of time over thirty days.*

The *defendants* in the case at bar did exactly the thing the Secretary condemned—taking the lease on March 20th, and *paying nothing for it*, and then waiting until April 5th, to file it (Rec. 47). Yet according to the view of the Superintendent and the Secretary

the law pertaining to filing and recording cuts no figure at all against the Departmental regulation *allowing a speculation* of the defendants for sixteen days.

On this view giving the regulations an improper interpretation and striking down the law, the Secretary's meaning is perfectly clear when he says that Anicker "would have the advantage" of prior filing if there were any advantage in that under the law. *He holds that under the law there is no advantage of prior filing.*

The defendants contend that the recording laws do not, either by their terms or by the terms of Congressional enactment, apply to Departmental leases. If defendants are correct in this contention, it necessarily results that either the court was in error in the *Shulthis-McDougal* case, or that case was based on a different state of legislation. The decision of the court in the *Shulthis* case, to the effect that leases were subject to recording laws even before Departmental approval, is exactly correct and in harmony with prior decisions of this court.

There is no difference between the law as it existed under that decision and as it exists today.

The Berryhill lease to Shulthis was given on March 24, 1906, which was prior to the Act of Congress of April 26, 1906. Assuming that the court decided the *Shulthis* case upon the law as it stood prior

to April 26, 1906, certainly no change in the law, relieving parties of the necessity of recording leases, was made by the Act of April 26, 1906, because that act *expressly requires such leases to be recorded under laws* "now in force in the Indian Territory."

It is contended by defendants that the Act of May 27, 1908, gives to the Secretary a vastly greater power than he had before, or in other words that while the Secretary was subject to recording laws under the *Shulthis* case, that since the Act of May 27, 1908, the Secretary's power has been greatly enlarged and puts him above recording laws.

There is nothing in the law of 1908 to justify such claims, nor to justify the contention that the Secretary had power to set aside the recording laws or suspend them during a 30-day period which he, as a matter of grace, gave the Departmental lessees.

We quote the first *proviso* from Sec. 2 of the Act of May 27, 1908, 35 Statutes at Large, 312, as follows:

> "That leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made with the approval of the Secretary of the Interior, under rules and regulations p r o v i d e d by the Secretary of the Interior, and not otherwise."

The rules and regulations referred to are not merely those already in existence as the defendants claim, but refer to any rules theretofore or thereafter promulgated. It would be a novel and bad construction of this law to say that this was a Congressional adoption of rules previously promulgated, because such construction would necessarily p r e c l u d e the idea that the Secretary was free to make such future regulations as his wisdom might dictate. Clearly the rules and regulations referred to are not thereby adopted by Congress but have reference to such regulations theretofore or thereafter promulgated, as may be made not in conflict with other Congressional enactments.

We quote also the second paragraph of section 3 of the same act as follows:

> "That no oil, gas, or other mineral lease entered into by any of said allottees prior to the removal of restrictions requiring the approval of the Secretary of the Interior shall be rendered invalid by this act but the same shall be subject to the approval of the Secretary of the Interior as if this act had not been passed: *Provided*, that the owner or owners of any allotted land from which restrictions are removed by this act, or have been removed by previous Acts of Congress, or by the Secretary of the Interior or may hereafter be removed under and by authority of any Act of Congress, shall have the power to cancel and annul any oil, gas or mineral lease on

said land whenever the owner or owners of said land and the owner or owners of the lease thereon agree in writing to terminate said lease and file with the Secretary of the Interior, or his designated agent, a true copy of the agreement in writing cancelling said lease, which said agreement shall be executed and acknowledged by the parties thereto in the manner required by the laws of Oklahoma for the execution and acknowledgment of deeds, *and the same shall be recorded in the county where the land is situate.*"

It will be observed that, by the latter part of this law quoted, it is contemplated that leases shall be recorded. Why should this act *require* lease cancellations to be recorded, and yet not contemplate, as previous laws required, that the lease itself be recorded? It would be a queer statutory condition which requires cancellations to be recorded without any requirement at all that leases must be recorded.

There is no hint in the law of May 27, 1908, that the Act of April 26, 1906, which c l e a r l y requires leases to be recorded should be repealed, and therefore both statutes must be construed in h a r m o n y with each other.

When the Act of April 26, 1906, is construed in connection with the Enabling Act it appears that Congress had the purpose of requiring leases to be recorded, but instead of adopting a hard and fast system of recording of its own phraseology, they

adopted the local system as the system to be used, whatever that system might be, and whatever its changes might be from time to time.

It would be more sensible to believe that Congress intended to have the recording system under which the leases must be recorded to harmonize with the local prevailing system rather than to have something in conflict with it.

Nor has the power of the Secretary been in any wise enlarged by the Act of May 27, 1908. The act approved June 30, 1902, commonly known as the Creek Supplemental Agreement (32 Stat. L. 500, section 17 of that act) provided as follows:

> "Creek citizens may rent their allotments, for strictly non-mineral purposes, for a term not to exceed one year for grazing purposes only and for a period not to exceed five years for agricultural purposes, but without any stipulation or obligation to renew the same. Such leases for a period longer than one year for grazing purposes and for a period longer than five years for agricultural purposes, and leases for mineral purposes may also be made *with the approval of the Secretary of the Interior, and not otherwise.* Any agreement or lease of any kind or character violative of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity."

It will be seen that the power of the Secretary

was quite as full and complete and absolute under the Act of 1902 as it is made by the Act of 1908, so that no enlargement of Secretarial power was made after the *Shulthis-McDougal* decision.

Defendants will probably offer authorities to the effect that recording a mere copy of a document is not such a valid recording as will charge constructive notice. The fallacy of defendants' position is that the instrument recorded in Creek County in the case at bar was not a mere copy, but was an additional original executed by the parties with all the formality attending those lodged with the Indian office. Such an additional original may be validly recorded.

The additional or fifth executed lease was properly recorded even though a fifth or extra *original* copy. (*Mitchell* v. *U. S.*, 9 Pet. 732, 9 L. ed. 290; *McPhaul* v. *Lapsley*, 20 Wall. 264, 22 L. ed. 344; *Herndon* v. *Casiano*, 7 Tex. 322, 331; *Blythe* v. *Houston*, 46 Tex. 77; *Titus* v. *Kimbro*, 8 Tex. 312.)

Duplicate contracts are treated as originals. (*Crane* v. *Portland*, 9 Mich. 493; *Jones* v. *Hoard*, 43 A. S. R. 19; *Jones* v. *Hoard*, 59 Ark. 42; *Mo. Pac. R. R.* v. *Herdenheimer*, 82 Tex. 200, 17 S. W. 608.)

Even as evidence such additional executed lease is treated as an original, to the end that secondary evidence is not admissible until both original and duplicates are accounted for. (17 Cyc 482; *A. G. S. R.*

R. v. Mt. Vernon Co., 84 Ala. 173, 4 So. 356; *Peaks* v. *Cobb*, 192 Mass. 196, 77 N. E. 881.)

While the recording of a copy merely is not authorized, the filing of the original and transcribing from a compared copy is sufficient. (*Central Tr. Co.* v. *Ga. Pac. Ry. Co.*, 83 Fed. 386.)

While that was not appealed from on that point, there was an appeal sustaining rights predicated on such recording. (*Central Tr. Co.* v. *Ga. Pac. Ry. Co.*, 87 Fed. 288.)

It is held that separate mortgages on lands in different counties, by and to the same parties, to secure the same debt, are separate transactions. (*McDonald* v. *Bank*, 106 Ia. 517, 76 N. W. 1011.)

Also that a mortgage on a railway running through several counties may have precedence in one county and be postponed to other intermediate liens through delay in recording in other counties. (*Ludlow* v. *Clinton Line R. R.*, 15 Fed. Cases No. 8600.)

To obviate this difficulty there has developed the modern practice in railroad cases of executing numerous original mortgages of same tenor covering the entire property and sending one copy to each place for record simultaneously. Each is an original and so treated and each expresses the entire contract.

V.

Seventh Assignment of Error.

This assignment complains of the decree of the trial court against complainant Anicker in that the decision of the court below apparently decided that the Secretary of the Interior has absolute and plenary power in the case, free of review by the courts in any cause or upon any ground.

(1) *The nature of departmental action.*

The plaintiff Anicker claims that the power and duty of the Secretary, in approving or disapproving oil leases, is a *quasi*-judicial power, exercisable under regulations akin to court rules, upon fixed principles of law, and having in view the purpose of the law in providing for such discretion. Defendants contend that it is an absolute discretion whose exercise may not be reviewed by the courts however arbitrary, whimsical and inconsistent with law. It is proper to consider the statute and decisions with reference to this power.

The Act of May 27, 1908, provides:

> "That leases of restricted lands for oil, gas, or other mining purpose * * * may be made, with the approval of the Secretary of the Interior, *under rules and regulations provided by the Secretary of the Interior*, and not otherwise." (35 Stat. L. 312.

This indicates not an absolute discretion in the Secretary, but a requirement that a system of rules and regulations be promulgated whereby fixed principles may be announced and the cases treated *quasi* judicially and not arbitrarily as to each individual case.

It is like the approval of bonds, reports, sales, etc., by courts; is given or withheld according to fixed principles and not arbitrarily or capriciously.

So many such cases arise that it is not to be expected that the Secretary can give personal attention to each individual case. He must promulgate principles and leave the details largely with subordinates under such principles.

Under such regulations the primary duty devolves upon the United States Indian Superintendent whose recommendations will be followed and not reversed except upon appeal.

The power in the Secretary was simply that of approval or disapproval. He could approve a lease but not initiate or make a lease; whether the contract should be made rested entirely with the Indian, or with the guardian and the court if a minor. (*Midland Oil Co.* v. *Turner*, 179 Fed. 76 (C.C.A. 8th Cir.).)

In *Jennings* v. *Wood*, 112 C. C. A. 657, 192 Fed. Rep. 507, it was said:

"The jurisdiction of the Secretary of the

Interior is only that expressed in the Acts of Congress. He was not constituted the general guardian of the estates of the Indians in the sense in which that term is usually employed. *Power was not conferred upon him to originate and make leases of allotted lands.* That was left to the Indians subject to his approval in specified cases. If an Indian did not desire to lease there was nothing for the Secretary to act upon; if he did, and the lease was for oil and gas, its validity depended on the approval of that official, *but he was not one of the contracting parties.* On the contrary, his connection with the transaction and his authority first arose after the minds of the contractors came together, and they must have been competent to make the contract submitted for approval. A disapproval was merely a veto. An approval which proceeds upon a consideration of the terms of the instrument offered and whether they are reasonably for the interests of the Indian was intended as an additional safeguard for his protection."

In *Crosbie* v. *Brewer*, 158 Pac. 389 (Okla.), not yet officially reported, the syllabus reads:

"*(a)* The Act of Congress of May 27, 1908 35 Stat. L. 312), does not confer on the Secretary of the Interior the right to enter into a lease contract affecting the restricted lands of a minor Indian. *(b)* That right rests solely in the guardian. *(c)* The only actual authority of the Secretary in such cases is either to approve the lease contract as made by the guardian or to withhold his approval."

In their brief below the defendants feign to find a "vivid line of demarcation between this case and those in which the courts have declared the wrongful patentee of public land a trustee of the title for the party actually under the law entitled to the patent." This is a distinction wholly imaginary and non-existent. The Secretary's every act, done pursuant to law, must in a sense, decide or construe the law unless he proceed heedless of the law. He is no more required to give a written opinion in a public land case than in an Indian lease case.

In the case of *Daniels* v. *Wagner*, 237 U. S. 547, 59 L. ed. 1102, it was shown that a similar contention was made by the defendant in that case to the point that some distinction existed between land grant cases and other cases in the United States Land Department and that the Secretary had unlimited discretion in one class of cases but was restrained by the law in other cases. This court held that the Secretary never had such full and untrammeled discretion in any class of cases whatsoever.

We cheerfully admit that it is the Secretary's duty to *construe the law correctly* in land cases, and we assert with perfect confidence that it is equally his duty to construe the law correctly in Indian lease cases. No law required the Secretary to decide the facts alone in any case or class of cases, and to decide the law in other cases and leave the facts alone.

He decides on both law and facts in many cases. When his decision is wholly on conflicting facts there may not be any review in any case from his decision except for fraud, and perhaps for gross mistake of facts. When his decision is on the law alone based on facts conceded, admitted or proven without dispute, his decision is subject to review even in Indian cases. (*Wallace* v. *Adams*, 74 C. C. A. 540, 143 Fed. 721.)

Of course there is no Act of Congress relating to Indian affairs requiring the Secretary to determine any one issue, whether of law or fact, before another. But when he brings his learning and wisdom to bear on any case and makes a decision thereof, and shows by an opinion why and how he decided it, the courts are warranted in believing that he meant what he said. If he bases his opinion wholly on the law, and regards the facts as without conflict, the courts do him no discredit in regarding his decision as based on the law and treating the facts as without conflict.

The power to approve, conferred on the Secretary, is judicial in its nature. It involves not only the power but the duty to determine the matters embraced in such power. (*Weyerhaeuser* v. *Hoyt*, 219 U. S. 388, 55 L. ed. 261-2; *Wisconsin C. R. Co.* v. *Price Co.*, 133 U. S. 496, 33 L. ed. 687, 694.)

In *Wegerhaeuser* v. *Hoyt*, 219 U. S. 380, the court says:

> "The power of the Secretary to approve selections is judicial in its nature, and implies the duty to determine *as of the time of filing selection*, and the doctrine of relation applies to decisions as to validity of such selections."

At page 389 this was said:

> "The party who takes the initiatory step in such cases, if followed up to patent, is deemed to have acquired the better right as against others to the premises. The patent which is afterward issued relates back to the date of the initiatory act, and cuts off all intervening claimants. Thus the patent upon a state selection takes effect as of the time when the selection is made and reported to the land office; and the patent upon a pre-emption settlement takes effect from the time of the settlement as disclosed in the declaratory statement or proofs of the settler to the register of the local land office." * * *

On page 388, after distinguishing *Frisbie* v. *Whitney*, 9 Wall. 187, and *Yosemite Valley Case*, 15 Wall. 77, it was said:

> "But whilst, according to these decisions, no vested right as against the United States is acquired until all the prerequisites for the acquisition of the title have been complied with, parties may, as against each other, acquire a right to be preferred in the purchase, or other acquisition of the land when the United States

have determined to sell or donate the property. In all such cases the first in time in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right."

Mr. Justice HARLAN, in dissenting opinion (p. 404) lays down this well recognized rule:

> "The jurisdiction and power of disposition which the Land Department has of the lands of the United States, like the power of every other department of the Government, is subject to the laws of the land, and the Land Department's violation or disregard of them is remediable in the courts."

In *Frellsen* v. *Crandall*, 217 U. S. 71, 78, the court says:

> "After the patent has once been issued, the original contest is no longer within the jurisdiction of the Land Department. The patent conveys the legal title to the patentee, and cannot be revoked or set aside except upon judicial proceedings instituted in behalf of the United States. The only remedy of Emblen is by bill in equity to charge Weed with a trust in his favor. All this is clearly settled by previous decisions of this court." * * *

If the Commission to the Five Civilized Tribes and the Secretary, though acting as a judicial tribunal, have been induced to issue a patent to the wrong party by an erroneous view of the law, or by

gross or fraudulent mistake of facts, the error may be corrected in equity. (*Robinson* v. *Owen*, 119 Pac. 999, 30 Okla. 484.)

There could be no revision or correction of the Secretary's rulings if his power were as absolute as it is claimed by defendants to be.

Wallace v. *Adams*, 74 C. C. A. 540, 143 Fed. 716, was cited by the last cited case. In this case the court declared:

> "Nor did the grant to the Dawes Commission and to the Secretary of the Interior of exclusive jurisdiction to determine matters relating to the allotment of land and to issue certificates which are conclusive evidence of the right of the allottee to the land therein described deprive those courts of their jurisdiction in equity, after the Commission and the Secretary have exercised this power and exhausted their jurisdiction, to determine whether by error of law or through fraud or gross mistake the Commission and the Secretary have failed to allot the land to the party who was under the law entitled to it and have assigned it to one who had no right to it. The jurisdiction of the Commission and of the Secretary and the effect of their action in the allotment of the lands of the Choctaw and Chickasaw Nations are the same in effect as the jurisdiction and effect of the action of the Land Department of the United States in the disposition of the public lands within its control. The Commssion under the direction of the Secretary

constitutes a special tribunal vested with the judicial power to hear and determine the claims of all parties to allotments of these lands and to execute its judgments by the issue of the allotment certificates which constitute conveyances of the right to the lands to the parties who it decides are entitled to the property. This tribunal undoubtedly has exclusive jurisdiction to determine such claims and to issue such a conveyance. The allotment certificate when issued, like a patent to land, is dual in its effect. It is an adjudication of the special tribunal, empowered to decide the question, that the party to whom it issues is entitled to the land, and it is a conveyance of the right to this title to the allottee. *U. S.* v. *Winona & St. Peter R. Co.*, 15 C. C. A. 96, 103, 67 Fed. 948, 955. Like a patent it is impervious to collateral attack. But, as in the case of a patent, if the Commission or the Secretary has been induced to issue the allotment certificate to the wrong party by an erroneous view of the law, or by a gross or fraudulent mistake of the facts, the rightful claimant is not remediless. He may avoid the decision and charge the legal title to the lands in the hands of the allottee, as he may that of the grant to a patentee, with his equitable right to it, either on the ground that upon the facts found, conceded, or established without dispute at the hearing before the special tribunal, its officers fell into an error in the construction of the law applicable to the case which caused them to refuse to issue the certificate to him and to give it to another, or that through fraud or gross mistake it fell into a misappre-

hension of the facts proved before it which had a like effect. *James* v. *Germania Iron Co.*, 46 C. C. A. 476, 479, 107 Fed. 597, 600."

In that case the power in the Commission and Secretary was expressed by the statute:

> "Exclusive jurisdiction is hereby conferred upon the Commission to the Five Civilized Tribes, to determine, under the direction of the Secretary of the Interior, all matters relating to the allotment of land." (Sec. 24 of Act of July 1, 1902, Choctaw-Chickasaw Agreement, 32 Stat. L. 641.)

Garrett v. *Walcott*, 25 Okla. 574, 106 Pac. 848, relies upon *Wallace* v. *Adams*, and quotes therefrom to same effect. That was a contest over an allotment.

Departmental decisions on matters of law are not binding on the courts, though entitled to respect. (*Hoyt* v. *Weyerhaeuser*, 88 C. C. A. 404, 161 Fed. 325; *Ross* v. *Wright*, 116 Pac. 949, 29 Okla. 186; *Hastings, etc., Co.* v. *Whitney*, 132 U. S. 357, 33 L. ed. 364; *U. S.* v. *Winona, etc., Co.*, 15 C. C. A. 117, 67 Fed. 963; *St. Paul, etc., Co.* v. *Sage*, 17 C. C. A. 558, 71 Fed. 40, 52; 32 Cyc. 1023; *Wisconsin C. R. Co.* v. *Forsythe*, 159 U. S. 46, 40 L. ed. 71; *James* v. *Germania Iron Co.*, 46 C. C. A. 476, 107 Fed. 597.)

Any action of the Department which is based on misconstruction of the law can be corrected by the courts (33 Cyc 1023).

Hawley v. *Diller*, 178 U. S. 476, 44 L. ed. 1157, 1162, from which we quote:

> "It is suggested that the order of the Land Department canceling the entry was based upon a misconstruction of the law. If it had been, then the error committed could be corrected by the courts; for, as said in *Sanford* v. *Sanford*, 139 U. S. 642, 647, 35 L. ed. 290, 291, 11 Sup. Ct. Rep. 666, where the matters determined by the Land Office 'are not properly before the Department, or its conclusions have been reached from a misconstruction by its officers of the law applicable to the cases before it, and it has thus denied to parties rights, which, upon a correct construction, would have been conceded to them, or where misrepresentations and fraud have been practiced, necessarily affecting its judgment, then the courts can, in a proper proceedings, interfere and control its determination so as to secure the just rights of parties injuriously affected'."

In 32 Cyc 1020-2, this is said:

> "A decision rendered by the officers of the land department upon a question of fact is conclusive and not subject to be reviewed by the courts, in the absense of a showing that such decision was rendered in consequence of fraud or imposition or mistake."

See also *Hawley* v. *Diller*, 178 U. S. 476, 44 L. ed 1157; *Calhoun* v. *Violett*, 173 U. S. 60, 43 L. ed. 614; *Johnson* v. *Drew*, 171 U. S. 93, 43 L. ed. 88; *James* v. *Germania Iron Co.*, 46 C. C. A. 476, 107 Fed. 597.

Even to be conclusive upon the courts, the decisions of the land department upon the facts must be made according to the regular rules of practice of the department and must be based on legal evidence or some formal request, at which the parties have fair opportunity of presenting their case. (32 Cyc, 1025.)

While the departmental decision, even on a question of law, is entitled to respect, as all decisions of judicial or *quasi*-judicial tribunals are, yet it is far from being entitled to be held sacred or impervious to proper review. The books teem with instances of confusion in departmental decisions, showing that departmental policies are not fixed, like legal policies under the doctrine of *res adjudicata*.

A recent instance (*Fairbanks* v. *U. S.*, 223 U. S. 222, 56 L. ed. 413, 414) thus illustrates this:

> "The latter order was suspended and an investigation instituted, *upon which one Secretary decided in favor of plaintiff and another Secretary decided in favor of Mooers.*"

In *Greenamyer* v. *Coate*, 212 U. S. 441, 53 L. ed. 590, it was said:

> "The case presents apparently contradictory decisions between two Secretaries of the Interior. The fact that the final conclusion as to the ultimate facts reached by the Department differ from the conception of such ultimate facts

entertained by the Department in previous stages of the controversy affords no ground for disregarding the conclusion of ultimate fact finally reached which was binding between the parties."

Even the Secretary, in a case within his jurisdiction, cannot make a retroactive decision abrogating such rules. (32 Cyc 1006.)

The Circuit Court of Appeals for the Eighth Circuit strongly disapproved the idea that regulations securing uniformity of practice are not necessary, and that arbitrary and whimsical exercise of power is permissible, in the case of *Germania Iron Co.* v. *James*, 32 C. C. A. 248, 89 Fed. 814.

The same case is to the effect that a court is bound by its own rules and the department is likewise. *(Id.*, 818.)

A decision by the Secretary holding that an entry in violation of departmental practice was superior to one in accordance with such practice, is an error of law reviewable by the courts. *(Germania Iron Co.* v. *James*, 32 C. C. A. 348, 89 Fed. 816-7; *Bogan* v. *Mortgage Co.*, 11 C. C. A. 128, 63 Fed. 193; *James* v. *Germania Iron Co.*, 46 C. C. A. 476, 107 Fed. 597.)

It may be claimed that there are decisions of the courts, including this court, that decisions of the Secretary in Indian affairs are not reviewable by

the courts. There are, indeed, three classes of cases pertaining to Indian affairs, in which the departmental function differs. In the first class the power of the department is absolute, without the power of review in the courts for any reason; of this class are cases pertaining to the political or administrative affairs of an Indian tribe. In a second class the Secretary acts judicially, with right of review by the courts in proper cases as indicated by authorities cited above, and the case at bar is in this class. The last class is where the Secretary acts but ministerially, as in issuing a patent when the right to it has become fixed in a legal way. The cases, when analyzed, show by the nature of the questions involved, to which class they belong.

We cite an instance of the first of the three classes alluded to. A regulation promulgated pursuant to law provided that no white person could be adopted into an Indian tribe without the approval of the department. The Secretary disapproved the adoption in a case and assigned no reasons, either of law or fact. *Held*, that his reasons could not be inquired into to see whether they were correct. (*U. S. ex rel West* v. *Hitchcock*, 205 U. S. 85-86, 51 L. ed. 721.)

That case is distinguishable from those of the other classes. The veto there has consequences politically significant to the whole tribe—the addition

or non-addition of another member, and possibly of many other members. The approval or disapproval of an oil lease concerns only the private property rights of the parties, as to which they have acted, and the only function of the department is to see that in making such contract the Indian has not been improvident.

To show the political elements involved in such citizenship question see *Red Bird* v. *U. S.*, 203 U. S. 76, 51 L. ed. 97. This case distinguishes between property and political rights in the tribe. The courts have no control over such political question, even if the granting of such citizenship might (but not necessarily) have conferred property rights; see also, *Cherokee Nation* v. *Hitchcock*, 187 U. S. 295, 307, 47 L. ed. 184, 190.

In the latter case it was said:

> "The action taken by the Secretary of the Interior upon application for leases for mining purposes on *tribal lands* authorizing him to execute such leases is a matter of administration, cognizable solely by the executive department."

That case was one where all tribal land was still in the nation as a whole and its control was necessarily political and involved no private rights. Congress was the sole paramount power capable of handling *tribal* property.

After tribal ownership ceases and the property is allotted or being allotted to tribal members, the determination of allotment rights is judicial power over private rights. (*Wallace* v. *Adams*, 143 Fed. 721, 74 C. C. A. 540, affirmed 204 U. S. 415, 51 L. ed. 547.

After allotment is fixed and adjudicated, the issuance of patent is but a ministerial duty. (*Ballinger* v. *U. S. ex rel Frost*, 216 U. S. 240, 249, 54 L. ed. 468.)

Thus the Secretary's duty under earlier legislation and conditions of public ownership was administrative, *i. e.*, political; then when allotment was made and private rights are involved his duty became judicial; and when the judicial function has been exercised, they may be ministerial.

The Circuit Court of Appeals in the concluding paragraph of its opinion in the case at bar (Rec., p. 141) said:

> "In our judgment the present case falls clearly within the rule which was enforced in the case of *United States* v. *Hitchcock*, 205 U. S. 80. The discretion of the Secretary of the Interior there was no more controlling than it is here. The mere fact that the Superintendent of the Agency and the Secretary of the Interior gave their reasons for deciding in favor of the Gunsburg lease, did not impair the broad discretion which the law grants to the Secretary of the Interior."

We submit this is a clear misinterpretation and misapplication of the *Hitchcock* case referred to for these reasons:

(a) In that case the Secretary gave no reasons for the decision complained of, wherefore the court must presume the existence of a sufficient reason justifying the Secretary's decision, even to presuming that the decision was on a contest of fact. This court said in that case "HE RAISED NO QUESTION OF LAW, but simply stood on his authority and put forward his decision as final." *In the case at bar he based his decision wholly on the legal question.*

(b) In the *Hitchcock* case in 205 U. S. 80, the decision was upon a question essentially administrative or political. The primary question in that case was whether the applicant, a white man married to an Indian, was by such marriage, entitled to citizenship in the Indian Nation, which citizenship incidentally involved the question of property rights. The political or administrative nature of this question was pointed out by this court in *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 47 L. ed. 183, which also pointed out that such questions are cognizable solely by the executive department.

The defendants have industriously collected and cited all of the authorities they can find using any

expressions with reference to the exercise of discretion and a revision thereof by the courts, and they assume that all official acts, unless utterly machine-made and brainless, are beyond the pale of court revision. Even the exercise of ministerial duties of ordinary routine character, require brains and the exercise of judgment and discretion, but they are none the less ministerial. The discretion which the courts declare will not be interfered with is usually *quasi-judicial* discretion, and the question whether it is within or without judicial review depends, not on the exercise of discretion, but on the nature of the rights and questions to which the discretion is applied. Thus the Commissioner of the Five Civilized Tribes acts judicially in awarding an allotment certificate. (*Wallace* v. *Adams*, 74 C. C. A. 540, 143 Fed. 721; s. c., 204 U. S. 415, 51 L. ed. 547.)

When by statute the certificate is conclusive of the rights of the allottee, the Secretary of the Interior acts ministerially in issuing a patent upon it and mandamus will lie to compel its issuance and delivery. (*Ballinger* v. *U. S. ex rel. Frost*, 216 U. S. 240, 249, 54 L. ed. 468.)

Here we have an illustration of how officers may act, each with good faith and learning, and perhaps with conspicuous ability, and each may use the same quantity of brains in the discharge of his duty. The Commissioner to the Five Civilized Tribes is under

the control of the Secretary of the Interior, yet we have the anomalous condition of the act of the subordinate being conclusive (except for fraud, error of law or gross mistake of fact) and the act of the superior is merely ministerial and may be compelled by mandamus, no matter how able and discreet the Secretary may be and how much he brings his judgment and discretion to bear on it.

This illustrates how we must look at the nature of the action taken and the question sought to be reviewed, rather than the officer's possession of judgment and discretion and his habit of exercising them. Were this not so we would not have a government of laws and fixed principles which r e m a i n stable through changes of political weather, but it would be a government of men, autocratic, whimsical, and as variable as the winds of politics.

The Secretary of the Interior has a discretion limited by law and common sense and the reason for its existence, to safeguard the Indian against improvidence. He cannot initiate a contract, and he is not licensed to aid the Indian to repudiate contracts or practice unfairness on the white man, who might thus need a guardian against the oppression of the Secretary.

When leases are presented to the Secretary for approval the sole question for him is "improvident or not." He need not decide anything *as between*

lessees in *improvident* contracts, for such do not merit official consideration after they are condemned for improvidence. There can be no contest in the Department which is entitled to official consideration at all except between lessees in *provident* leases. While the Secretary cannot be controlled by mandamus during the time the case is *in fieri*, in the Department, by analogy to the public land decisions, his decision can be revised when departmental jurisdiction has ceased.

When the Secretary has decided that two conflicting leases are entitled to favorable consideration (not necessarily that he approve both), then *and not until then*, need he choose between them. If both leases are not improvident *he should decide between the conflicting ones on the same principles that the law would bring into view in deciding between them had his approval not been necessary.*

After he has decided both leases to be not improvident, he has discharged the primary duty the law puts on him, then he has imposed on him the additional duty of choosing between contesting lessees only because his ward, the Indian, has wrongfully entered into conflicting obligations. Of course nothing in the terms of the leases themselves in the case at bar could make one of them provident and the other improvident, because they were *both identically alike in terms.* Each had the same security

for its performance, each with approved surety company as surety, and each complied in all respects with Departmental regulations.

It is therefore small wonder that the decision of all officials from the Superintendent to the Secretary, both inclusive, made no comment on any lease as improvident or on any lessee as unfit, but conceding the fairness and providence of both leases, *based their decision wholly on their conception of the law applicable to a contest between satisfactory leases,* to such an extent that the Secretary who is the ultimate Departmental authority, says in his opinion, "If there were any advantage in the prior filing of a lease which was entered into and executed after another lease, both having been filed at the Agency within the time required by regulation, Anicker would have that advantage." (Rec., p. 54.)

The sole function of departmental approval was stated in the case of *Shulthis* v. *McDougal,* in 95 C. C. A. 615, 170 Fed. 536-7, thus:

> "While it (the lease) required the approval of the Secretary of the Interior before it became in all respects binding, that approval was intended *solely to protect the Indian against improvidence.* When the lease was executed and delivered it created an inchoate interest in the land which by the approval of the Secretary became absolute without any further act of the parties * * * and the object of the supervising

approval of the Secretary of the Interior was simply to protect the Indian against the improvident disposition of his property. *Pickering* v. *Lomax*, 145 U. S. 310, 36 L. ed. 716."

In *Pickering* v. *Lomax*, *supra*, this court said:

"The object of the proviso was not to prevent the alienation of lands *in toto*, *but to protect the Indian against the improvement disposition of his property*, and it will be presumed that the President before affixing his approval satisfied himself that no fraud or imposition had been practiced upon the Indian when the deed was originally obtained."

In the case at bar the Secretary adjudged that the lease to Anicker was not improvident by saying that "if there were any advantage in the prior filing of a lease * * * Anicker would have that advantage." He could hardly adjudge otherwise because in terms and language it was exactly the same as the lease to Gunsburg and the Southwestern Petroleum Company.

The law governing the Creeks, construed in *Shulthis* v. *McDougal*, was section 17 of the Supplemental Agreement of the Creeks, Act of June 30, '02, 32 Stat. L. 500, as follows:

"Creek citizens may rent their allotments, for strictly non-mineral purposes, for a term not to exceed one year for grazing purposes

only and for a period not to exceed five years for agricultural purposes, but without any stipulation or obligation to renew the same. Such leases for a period longer than one year for grazing purposes and for a period longer than five years for agricultural purposes, and leases for mineral purposes may also be made with the approval of the Secretary of the Interior, and not otherwise. Any agreement or lease of any kind or character violative of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity."

The Act of May 27, 1908, (35 Stat. L. 312) in force when the Eastman Richard leases were made, provides as follows:

"*Sec. 2.* * * * Leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, *under rules and regulations provided by the Secretary of the Interior*, and not otherwise;

"*Sec. 3.* * * *and also any lease of such restricted land made in violation of law before or after the approval of this Act shall be absolutely null and void."

It will be noticed that the former Act construed in the *Shulthis-McDougal* case, merely pro-

vided for approval of the Secretary. The later act governing this case, provides for the approval "under rules and regulations provided by the Secretary of the Interior." It is not a grant of plenary power which he may exercise capriciously, regardless of regulations but he must exercise the power only under rules and regulations promulgated for that purpose. In short he must provide a system of regulations by which parties may be governed and upon which their rights and conduct must be based and concerning which they have the opportunity of being informed. This restriction upon the power of the Secretary where none seemed to exist before, seems utterly at variance with the idea that the act of the Secretary in approving or disapproving a lease, may be based upon his mere will, without rhyme or reason, or that the Act of 1908 struck down all limitations upon the Secretary's power.

It is also to be noticed that both acts denounce only leases "violative of" or "in violation" of the law. A lease expressly agreed to be submitted for approval and so filed for submission is in obedience to the law and not in violation of it.

It was contended by defendants below, and will probably be contended again, that the courts cannot inquire into the reasons upon which the Secretary of the Interior acted in a departmental case. That is true in those political cases of the class first above

mentioned, but is not true as to the other classes of cases. In revising the Secretary's mistakes of law, such are of the very essence of his "reasons." Even if his reasons are matters of fact they may be reviewed when his mistake of fact is gross.

In the brief below the defendants state their first point which is a contention that the action of the Secretary in reference to approval or disapproval of leases is a matter beyond the reach of the courts in any aspect. Such a contention overlooks several important things which we shall mention.

The nature of Departmental action is indicated by the law, and the purpose of the Departmental action has received consideration at the hands of the courts. *Shulthis* v. *McDougal*, 95 C. C. A. 615, 170 Fed. 529, and *Lomax* v. *Pickering*, 173 U. S. 23, 42 L. ed. 601, hold that the approval or disapproval of the Secretary goes *merely to the question whether the contract is improvident*, and the Secretary's jurisdiction is limited to that question. Defendants' contention also overlooks the fact that the Secretary himself is a creature of Congressional law, and he is not above the statutes passed by the same legislative body which created him, and he is not above laws passed by Congress which are co-ordinate with those which created him.

While we cannot look into the mental operations of the Secretary of the Interior, there are certain

considerations entering into his action that we may view to some extent. His duty is primarily and solely to protect the Indian against improvidence. He is not guardian plenipotentiary, and he is not the keeper of the Indian's conscience. The Indian may contract as he pleases, and the Secretary may not interfere, save as he safeguards the Indian by withholding approval of an improvident lease. When a lease is tendered for approval the primary question for the Secretary to determine is between the Indian and the Government as his guardian. If the Secretary obeys the law, as he is sworn and presumed to do, he approves it if not improvident, and disapproves it if it is improvident. With only one lease before him his duty is simple. When the Indian makes conflicting leases the duty of the Secretary is the same as to each lease, together with the added duty of adjudicating the rights of the conflicting lessees because he could not approve both without the same bad faith as the Indian, unless he saw fit to approve both and remand the conflicting parties to the courts for a settlement of their rights. As the purpose of Departmental action is to settle matters promptly, the Secretary makes this adjudication instead of remanding it to the slower action of the courts. If either one of the two conflicting leases be improvident a simple rejection of it on that account leaves the field of official approval to the other lessee. Of course, improvidence

may consist either in harsh terms or in the fact of contracting with an unworthy lessee with whom it would be unwise to contract on any terms.

If both leases be not improvident so that each merits approval, *then and not until then*, does a contest arise between conflicting lessees. If the circumstances do not give rise to such conflict, it is as much the duty of the Secretary and his subordinates to say so, as it is for them to decide such a conflict after it comes into existence. We contend that the fact that such a conflict was decided by the Department is conclusive that such a conflict existed. There could be no conflict between lessees unless both had a status as such, that is, that they were both proof against the objection that their contracts were improvident, and both were entitled to approval or disapproval according to their equities in the disposition of the conflict.

We agree with defendants' contention in their brief below that it is the right of a natural person to select those with whom he contracts, and in this we are in harmony with this and all other courts; but this question has already been determined in this case *by the Indian* who made a contract with Anicker. *It is the right of the Indian* to select those with whom he will contract, and it is *not* the right of the Secretary to select those with whom the Indian shall contract.

The Secretary may declare as a part of his decision on the improvidence of a contract that the Indian may not contract with undesirable people, but he cannot affirmatively select those with whom the Indian must contract. The Secretary has not declared the contract with Anicker improvident, notwithstanding the personality of Anicker as a lessee might conceivably enter into the question of the Secretary's approval of the lease because of providence or improvidence. *There is no hint anywhere in the official opinions that it would be improvident to contract with Anicker.* The Superintendent clearly regards Anicker as a proper contracting lessee by saying in his opinion that the Anicker lease must be disapproved "not because he was in any way delinquent himself but because of the prior lease to David Gunsburg," etc. (Rec. 50), and by sending on Anicker's bond and lease so that the Secretary may approve it if he sees fit to do so regardless of the Superintendent's recommendation, and by the Superintendent sticking to priority alone for his decision.

The Secretary says the same thing and concludes his last opinion with the suggestion that if there were any advantage in priority of recording, "*Anicker would have that advantage*" *which he could not possibly have if a lease to him were improvident.*

If Anicker was not an acceptable contractor, a short, simple sentence would have settled the question and have rendered the long and elaborate opinions upon the legal question both useless and absurd.

The Secretary declares that "until approved by the Secretary it was not a complete instrument" (Rec. 54), which declaration is in conflict with the opinion of the court in *Shulthis* v. *McDougal*, 95 C. C. A. 615, 170 Fed. 536, and with *Lomax* v. *Pickering*, 173 U. S. 26, of which the department clerk who prepared the opinion for the Secretary was probably unaware.

So also the declaration in the concluding paragraph of the Secretary's opinion that "the fact of its having been recorded in a county office can not estop the Secretary from finding that another lease regularly executed and filed is more for the allottee's interest and better entitled to approval," is likewise in conflict with the decision of the court in *Shulthis* v. *McDougal*, 95 C. C. A. 615, 170 Fed. 536, and with the opinion of this court in *Lomax* v. *Pickering*, 173 U. S. 26, which declare that the Secretary's function is only to guard against the improvidence of the Indian. We deny that the Secretary is rightly the ally of the Indian to aid him in exacting an unfair advantage from the white people and to enable the Indian to pick the best one of a series of conflicting contracts made by the Indian regardless of his obligation thereunder, or

of the rules of law governing the rights of conflicting lessees.

We deny the Secretary's power in the terms in which his opinion thus assumes it to be. The court cannot presume that the Secretary had any such unfair idea in mind when making his decision, without charging (rather than crediting) the Secretary with a purpose to help the Indian to the point of dishonorable action.

The defendants contend that the lease, before approval by the Secretary of the Interior, is an absolute nullity and that the Indian could disregard and repudiate it at any time before the Secretary's action thereon. That contention is altogether wrong. In the case of *Almeda Oil Company* v. *Kelley*, 35 Okla. 525, 527, 130 Pac. 931, an Indian, while under restrictions, made a lease of his property. Pending Departmental decision to approve or disapprove, his restrictions were removed and the Indian then sought to repudiate the contract made while he was under restrictions, which was then pending in the Department. Nevertheless, in due course after the removal of restrictions, the Secretary of the Interior approved the lease previously made, and the Supreme Court of Oklahoma in a contest over its validity held the lease to be binding on the Indian and said:

> "The parties to this contract were both qualified to enter into it; the consideration was

valid, the subject-matter legal, and there was a mutuality of obligation depending merely upon the approval of the Secretary of the Interior. The contract is not assailed on any of the grounds which usually render contracts invalid, but solely upon the ground that, prior to the time when the Secretary acted, one of the contracting parties had changed his mind and desired to withdraw therefrom, and further that his right to deal with his land had been finally and completely vested in him, and hence the Secretary's power or authority to approve it had lapsed."

The decision was based on *Pickering* v. *Lomax*, 145 U. S. 310, 36 L. ed. 716, holding that the official approval related back and validated the deed as of the date of its execution.

In their brief below the defendants stated that the only point decided by the Secretary was that his discretion was not controlled or extinguished by the recording laws nor by the status of a subsequent lessee as a *bona fide* purchaser over a prior lessee. This is a rather remarkable contention in view of the plain language of the official decision. The Secretary's opinion appears in the record pages 51-3 and his additional opinion on pages 53-4. In his additional opinion he says, "The former (defendants' lease) was approved on the ground of priority of execution, though the latter (Anicker's lease) was filed first at the Indian Agency. Both were filed at the Agency

within 30 days from their execution as required by rule."

The Secretary states (Rec. 52) in his original opinion:

> "The rule of practice is that among competing leases, duly filed in compliance with the rule, the lease first executed shall be accepted; *i. e.*, the date of execution governs. Anicker contends that the date of filing ought to govern. * * * In very many cases, a considerable time is required after the signature of a lessor is obtained for the execution by the lessee, the making of the bond and other papers. The Secretary in the exercise of the power vested in him by law, has given thirty days for this purpose."

The rule of practice referred to is not supported by any citation of departmental decisions. Naturally the departmental practice has been to give official recognition to leases filed at any time within thirty days where no conflicting leases challenged the propriety of waiting for almost the whole thirty days. No citation was made of any case of conflicting leases wherein the question of the recording laws was involved. *Whatever may have been the practice in cases of contested leases not involving the recording laws, whenever a case arises involving the recording laws put in force by congressional enactment, the departmental practice and interpretation of regulations must be brought into harmony with the law.* If

the departmental "practice" runs counter to the laws put into force by Congress, the practice must fall.

In the Secretary's supplemental opinion (Rec. 54) he states:

> "If there was any advantage in the prior filing of a lease which was entered into and executed after another lease, both having been filed at the agency within the time required by regulation, Anicker would have that advantage. The Act of March 1, 1907 (34 Stat. 1026), makes the filing at Union Agency legal notice. Anicker's lease is stamped as filed at the Agency March 30th, 1912. Until approved by the Secretary it was not a completed instrument and the fact of its having been recorded in a county office cannot estop the Secretary from finding that another lease regularly executed and filed is more for the allottee's interest and better entitled to approval."

Exactly in the line with the Secretary's assumption of supreme power, regardless of and in conflict with the Congressional enactment making recording laws operative, the Superintendent advised the Secretary, in his opinion as follows (Rec. 50):

> "The Secretary clearly having the right to fix a reasonable period within which time lessees may and must file their leases for approval, it follows that if such a regulation is made all lessees must receive the same treatment, both as to the benefits or privileges of taking the time al-

lowed or on the contrary the penalty, if they fail to comply with the regulation."

The assumption by the Superintendent of the Secretary's power to wipe out the recording law is not based on any authority.

It is true the Superintendent cited (Rec. 49) the case of *Simmons* v. *Whittington*, 27 Okla. 356, 112 Pac. 1018, but that case is not in the slightest degree applicable and is no support for his contention. The rule in that case and the 30-day rule which he discusses are so dissimilar in purpose and effect that they have no point of similarity except the coincidence that each is for thirty days. They resemble each other only as a thirty-day jail sentence resembles a thirty-day hotel bill or thirty days' interest on a promissory note; that is, only in point of time covered thereby.

We deny the correctness of defendant's contention in their brief below that in order to state a case for the consideration of the equity court we must show a *vested right* to the approval of the lease at least in the sense in which defendants make use of the term "vested rights." As the court said in *Shulthis* v. *McDougal*, 95 C. C. A. 615, 170 Fed. 536, the lease has inchoate validity even before approval. When it was made by the Indian, Anicker had a vested right to the judicial consideration of his case

by the Secretary, and if the Secretary found the facts to exist, which, under the law, entitled Anicker to approval of his lease, then Anicker had a "vested right". Of course, the plaintiff's right need not be so far vested as to be beyond the exercise of judicial discretion and make the approval a ministerial matter. It is somewhat of an absurdity to claim that rights must be vested so far as to be *beyond the discretion* of the Secretary in order to entitle Anicker to invoke the exercise of the Secretary's discretion.

If on undisputed facts ascertained by the Secretary, when the law is correctly applied to them, the complainant is entitled to the approval of his lease, that is sufficient under all the authorities to warrant the aid of a court of equity to correct the Departmental error of law.

The defendants pressed their contention that the right of the plaintiff must be a vested right to entitle him to the court's consideration, and in that behalf they cited the case of *Hoyt* v. *Weyerhaeuser*, 161 Fed, 330. The use of the term "vested right" is only relative, and does not mean necessarily such a right as would be considered vested under any and all circumstances. Paraphrasing the *Hoyt* case, it only means that "Jones (Anicker in this case) did everything required of him by the law." If the approval of the Secretary is a condition precedent to the right to ask the Secretary's favorable

consideration of the application for approval, then we are required *to get a decree of this quasi-court before the cause is instituted*, or, in other words, to produce results before the cause thereof comes into being.

The case of *Hoyt* above cited is both analogous to and distinguishable from the case at bar, and when the points of analogy and distinction are borne in mind, we are content to rest our case on that case as authority. Let us quote and analyze it. That case says:

> "The question here is, *not the jurisdiction, but the legality*, of the decision of the Land Department and especially of the Secretary, its head, whereby he awarded this land to the railroad company. The facts and the law warranted and require its award and sale to Jones. When he presented his application to purchase it under the timber and stone act, the railway company's selection of it was unapproved by the Secretary, and that company was without equitable right to it. The Land Department had jurisdiction to accept the application of Jones and to sell the land to him, or to approve the selection of the company and to award the land to it. It exercised this jurisdiction, accepted the application of Jones, permitted him to enter the land, to prove up his claim to it, sold it to him, took his $100 in payment for it, and issued to him his receiver's receipt, and did all this before the selection of the company was approved and before the company could acquire any right to the land. Jones' equitable title to the land had then vested,

and, while the jurisdiction of the Land Department continued until the patent issued, its power was neither arbitrary, unlimited, nor discretionary, and its action was subject to judicial correction for error of law, fraud, or clear mistake. *The jurisdiction and power of disposition which the Land Department has of the lands of the United States, like the power of every other department of the government, is subject to the laws of the land,* and the Land Department's violation or disregard for them is remediable in the courts. Its power 'cannot be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secures a vested interest in the property and a right to a patent therefor, and can no more be deprived of it by order of the commissioner than he can be deprived by such order of any other lawfully acquired property. Any attempted deprivation in that way will be corrected whenever the matter is presented so that judiciary can act upon it.' *Cornelius* v. *Kessel*, 128 U. S. 456, 461, 9 Sup. Ct. 122, 32 L. ed. 482; *Germania Iron Co.* v. *James*, 89 Fed. 811, 818, 32 C.C.A. 348, 354, 355; *James* v. *Germania Iron Co.* 46, C. C. A. 476, 481, 107 Fed. 597, 602; *Black* v. *Jackson*, 177 U. S. 349, 357, 20 Sup. Ct. 648, 44 L. ed. 801; *Orchard* v. *Alexander*, 157 U. S. 372, 383, 15 Sup. Ct. 635, 39 L. ed. 737; *Brown* v. *Hitchcock*, 173 U. S. 473, 478, 19 Sup. Ct. 485, 43 L. ed. 772."

The railroad company, whose selection was prior, pending and unapproved, is like the defendants

in the present case, whose lease was prior and *deliberately and speculatively withheld from filing* for approval. Jones, who made the application to purchase, and did purchase, and did "everything required of him by the law," is like Anicker who took his lease and properly filed it, and "did everything required of him by the law." The "contract" with Jones in the *Hoyt* case was made by the Department taking his application and his money, all before the railroad company pressed its selection for approval. Anicker's contract was with the Indian and part of the bonus was paid to the Indian before the defendants filed their lease or asked for its approval. The Land Department, with power to take part, by accepting the application in initiating of a sale of public land, had jurisdiction to accept the application of Jones and sell the land to him or to approve the selection of the company instead; and when Jones applied to the Department it had the power to do either one of these two things, and once the departmental choice was made, it ought not to be repudiated, and the course chosen merited ultimate departmental action to bring Jones' right to perfection. In the present case *the Indian (and not the Secretary)* who alone could initiate a lease, apparently had the power to sell a new lease to Anicker, notwithstanding the existence of the older one, without Anicker's knowledge, to the defendants, because

the Indian persuaded Anicker that no conflicting lease existed and investigation revealed no conflicting lease in the Department or in the county recording office. Wherefore, by reason of defendants' failure to file, they are postponed to Anicker, so that Anicker's rights as lessee then merited ultimate departmental action to bring that right to perfection. Anicker's rights were vested to the same extent that Jones' rights had vested in the case quoted from. He had an equitable standing which needed further departmental action to bring his acts to that state of perfection rendering it complete. The further jurisdiction to handle the matter in the Department should have been exercised in Anicker's favor and it was error of law to rule against him. The Department's power of disposition of the then pending matter was *subject to the laws of the land*, as Judge SANBORN said and it should not be made in disregard thereof.

In their brief below defendants make the point that Anicker expressly made his contract contingent upon the Secretary's approval. This clause referred to, printed in the contract of a Departmental blank furnished by the Department, only meant that it should be presented to the Secretary of the Interior "under rules and regulations provided by the Secretary of the Interior," which must be in harmony with the law, and meant only such submission

to his discretion as the law provided, and Anicker did not make any particular person his umpire to decide arbitrarily.

The courts have decided that the lease has inchoate validity in advance of Departmental approval. (*Shulthis* v. *McDougal*, 95 C. C. A. 615, 170 Fed. 536.)

With this the defendants do not agree.

Suppose, in the case at bar, that, pending Departmental action, the restrictions of the Indian had been removed and the Department then refused to act at all for want of jurisdiction. Can there be any doubt that the rights of the contesting lessees must be settled by the courts upon the hypothesis, that, *as against the Indian both leases are valid*, and that the controversy between the conflicting lessees must be determined according to the law of the land, *including the recording laws*, and not according to a mutilated code with the recording laws torn out?

The lease is not dependent upon its approval for its validity, *even by the terms thereof*. The lease itself is set out on pages 17 *et seq.* of the record. It shows that the lease is to run for ten years "from the date of the approval hereof by the Secretary of the Interior, and as much longer thereafter as oil or gas is found in paying quantities." This merely indicates when the term shall begin. *The lease it-*

self is effective at once according to its terms as between Anicker and the Indian, and the approval of the Secretary is not made a condition precedent to such inchoate validity. A lease may be presently made with the term to begin *in futuro*. (*Scraper* v. *Boggs*, 117 Pac 194, 27 Okla. 715).

The defendants' lease is executed *on the same form* as plaintiff's. These forms were prepared and printed by the Department, pursuant to Departmental regulation regularly promulgated and of which this court takes judicial notice, and the *Department does not permit the use of any other form* and would not consider a lease in any other form. It would be manifestly unfair to force parties to use a form containing stipulations making Departmental approval necessary and then declare that they voluntarily assumed the onus of such stipulations.

In its opinion in the case at bar the Circuit Court of Appeals takes the position that the recording law "has no bearing whatever upon the discretion which the law grants to the Secretary of the Inior in his *guardianship* over the Indians." In the abstract that is a correct statement, but in its application in the instant case it is wholly erroneous. While it is true that the recording act does not bear on the Secretary's discretion, the recording act is nevertheless valid within its field of operation and is binding upon the Secretary as well as upon other

persons. The Secretary's discretion is not an arbitrary, unlimited and absolute power to accept or reject the contract under any and all circumstances, but has a fixed and definite purpose as indicated by *Lomax* v. *Pickering*, 173 U. S. 26, and *Shulthis* v. *McDougal*, 95 C. C. A. 615, 170 Fed. 529.

This function of the Secretary is to guard the Indian against improvidence, and insofar as the Secretary acts in determining the question of providence or improvidence he is absolute and there is no limit upon his discretion; but if two leases come before him, each of which he believes and determines to be not improvident and to merit his approval insofar as the fairness of the contract is concerned, and there remains only the legal question whether the recording statutes apply, *the Secretary is bound by the recording statutes unless we place the Secretary above the law which created him.*

The Circuit Court of Appeals states "that is so because there are no acts specified in any law by the doing of which any person can acquire a legal right to the approval of such a lease." While it is true no statute declares what must be done to entitle a contract coming within his supervision to his approval, common sense, the purpose of the legislation and judicial interpretations of prior laws vesting similar discretion in the Secretary, have determined the nature of the things to be done to entitle a per-

son to the legal right to the approval of such a lease. This court has interpreted a similar statute with reference to the discretion of the President to approve or disapprove a conveyance by an Indian as declaring that the purpose is to guard the Indian against improvidence, *Lomax* v. *Pickering*, 173 U. S. 26, *and that is the sole purpose*, notwithstanding the discretion of the Secretary within that scope may be seemingly absolute. The enactment of the subsequent law of 1908 giving such a discretion in the Secretary is to be considered as an enactment made in the light of prior adjudication indicating the purpose of such discretion and must be deemed a legislative or congressional enactment of such purpose as completely as if such purpose were written in the law itself. The Court of Appeals itself, in the case of *Shulthis* v. *McDougal*, 95 C. C. A. 615, 170 Fed. 529, has declared exactly the same purpose.

The opinion of the Circuit Court of Appeals in this case takes too broad and erroneous view of the Secretary's power. While confessing that the Secretary "cannot initiate a lease" it maintains that the approval of the Secretary "is really the dominant factor in the making of such an instrument" and further "the whole subject, on the other hand, is left in the field of bargain and contract and the Secretary in exercising this discretion *as a guardian of* the Indians has all the freedom which a private per-

son would possess in respect of such a contract." The Indian is thus likened to a minor or insane person and all validity whatever to the Indian's contract is denied. That is out of harmony with the prior views of the Court of Appeals for the eighth circuit and also out of harmony with the views of this court. The contract of the Indian has inchoate validity, and it is so far valid that even if the Indian should die before the approval of the Secretary or the President, as the case may be, the approval of the Secretary or the President after the death of the Indian, would relate back and give complete validity as of the date of the original contract. *Lykins* v. *McGrath*, 184 U. S. 169; *Shulthis* v. *McDougal*, 95 C. C. A. 615 170 Fed. 529. The Indian is not like a minor whose contract has no validity unless validated by express validation or inaction after attaining majority. The act of the Indian is not presumed to be improvident, but is presumed to be provident. The Secretary passes upon the case exactly as if he were a court seeking to declare a contract void for fraud where the fraud consists of improvidence in the contract made by persons in confidential relations. The Secretary is a summary court exercising his judgment without formality and by any sort of investigation he cares to make and unhampered by any burden of proof. His passing on the case is confined entirely to the question whether the Indian

has made a fair or unfair contract. It would be most astonishing if the Indian should make a contract that was entirely fair and the matter be presented to the Secretary for his approval and at some time before the routine of the Interior Department approval can be finished, the Indian seeks to repudiate because he can get a better offer from another person through developments of the field in the meantime. Would the Secretary aid the Indian to dishonest repudiation because, as indicated in the opinion of the Secretary, he fancies he has a discretion to determine that "another lease regularly executed and filed is more for the allottee's interest and better entitled to approval?" If that be the correct view then the last offer made before the moment the Secretary affixes his approval is the only one, and one best entitled to consideration if it be larger than the others. Even the Indian Department itself does not entertain such monstrous view of the Secretary's function. They regard the Secretary's discretion as one to be e x e r c i s e d *as applied to* the circumstances and *at the date of the contract being passed on.* In the appraisement of the property for purposes of bonus they fix the bonus to be paid under the Anicker lease one price based upon the state of development and prospects *upon the date of the lease,* and the amount to be paid under the Gunsburg lease at a different amount based upon the state of prospects

and development on its date, notwithstanding nothing but a judicial difference existed between the two leases. In practical administration the Department therefore recognized the correct view that the Department passes upon the fairness of the lease *as of its date and of the circumstances at that date*, and the last argument of the Secretary to support his own erroneous ruling is not sound.

We admit as the Circuit Court of Appeals states "the whole subject, on the other hand, is left in the field of bargain and contract" but this field of bargain and contract is *solely the Indian's field* and not the field of the Secretary. It is difficult to see how, if he cannot initiate a contract, he can take any substantial part in the matter of making it. We also admit that the Secretary, "in exercising this discretion as the guardian of the Indians has all the freedom which a private person would possess in respect of such a contract." This discretion, however, does not go to the point of making a contract because the contract comes to him already made and he is not called upon to make or to assist in making it at all. He is simply called upon to pass upon its providence or improvidence and when the latter field is reached he has perfect and absolute freedom and if he decides the question of providence and bases his decision upon that it is a decision from which there is no appeal to the courts.

The Circuit Court of Appeals admits that the statute "requires him (the Secretary) to make rules and regulations for the guidance of the parties seeking such leases and to the extent such rules and regulations are made the Secretary is restricted but not otherwise." It is most peculiar to maintain, however, that the Secretary's regulations promulgated by him pursuant to the requirement of Congress operate as a restriction upon his discretion, and at the same time that *LAWS passed by Congress can be ignored by him* when they come into play in a case before him. We do not believe that kind of a doctrine is sound.

The Circuit Court of Appeals states "the Indian is wholly incapable of disposing of valuable rights which are frequently involved in such cases. The real investigation must be made by the officers of the government, otherwise the rights of the Indian would be frequently sacrificed." Some Indians are highly intelligent and well educated. Such as possess the requisite intelligence do not need the supervision of the Secretary but as the majority of them do not possess sufficient intelligence the rule provides for the approval of the Secretary in all cases. How could the rights of the Indian be sacrified except by means of an improvident contract? There would certainly be no sacrifice of the Indian's rights if he made a contract and takes money therefor today,

manifestly to his interest and which the Secretary would clearly approve if he did not have three or four months of office routine to go through before it reached him. If at the end of that three or four months the Indian Department desires to disaffirm because somebody else has made a better offer induced by developments in the meantime, can it be said the rights of the Indian are in any wise *sacrificed* if the contract be made and the money the Indian accepted were provident when making the contract, though he now has opportunity, through dishonest repudiation, of making a better contract later on?

The Circuit Court of Appeals finds support in the Secretary's final word in which the Secretary claims the right to choose between leases submitted for his approval, both being absolutely fair and not improvident, if he deems one to be more for the allottee's interest. Not alone is this an execrable doctrine and wholly against public policy but *it has no place even in this case.* While it is the Secretary's erroneous argument in a later endeavor to sustain his erroneous ruling, *the facts as found by the Secretary* show it has no place in the case. The Secretary stated in his opinion, as did the lower officers, that the *decision of this case was solely upon the legal question whether the recording laws apply to this case or not.* There is no intimation anywhere that the Anicker

lease was improvident, but on the contrary the Secretary stated expressly that "if there were any advantage in the prior filing of a lease entered into and executed after another lease *both being fair* and filed at Union Agency within the time required by the regulations, Anicker would have that advantage." It would be incredible that Anicker could have this advantage unless he enjoyed on the facts a status as the holder of a lease not improvident, and was capable of enjoying that legal advantage consequent upon the law points being in his favor.

The case of *Daniels* v. *Wagner*, 237 U. S. 547, 567, 59 L. ed. 1102, very emphatically repudiates the doctrine contended for by the defendant in this cause and sustained by the courts below in the case at bar. It is but fair to the Court of Appeals, however, to state that the opinion in the *Daniels-Wagner* case was not published and generally circulated at the time when the Circuit Court of Appeals prepared its opinion in this case.

In the *Daniels-Wagner* case (125 C. C. A. 93, 205 Fed. 235) the court sustained the contention of parties situated like the defendants in this cause to the point that it is within the discretion of the Secretary of the Interior to follow the law or to refuse to follow the law he is administering. In stating the case in *Daniels* v. *Wagner*, it was (p. 556) said:

"The trial court sustained the demurrer, and in substance held that the Land Department had the discretionary power to award the lands, without reference to the priority of the applications, to the persons selected as a result of taking into account the general equitable considerations stated in the opinion of the Secretary of the Interior which we have already quoted. On appeal the decree of the trial court was affirmed. It was held that the Land Department, as to the character of the entries in question, possessed the discretionary power which was relied upon by the Secretary of the Interior as the basis for his action."

* * * * * * *

"This brings us to determine whether the Land Department had a right to reject a prior lieu land entry or entries and award the land to subsequent and subordinate applicants under the assumption that it possessed a discretionary right to do so,—an authority the possession of which was sustained by both the courts below."

This court effectively disposed of the fallacy of this claim of unlimited discretion in the Secretary by saying (pp. 558-9) as follows:

"When these conclusions are accepted it results that the claim of discretionary power is substantially this: That in a case where, under an Act of Congress, a right is conferred to make an application to enter public land, and a duty imposed upon the Department to permit the entry, the Department is authorized in its discre-

tion to refuse to allow that to be done which is commanded to be done, and thus deprive the individual of the right which the law gives him."

Like the defendants in the case at bar, the defendants in the *Daniels-Wagner* case cited *Hoyt* v. *Weyerhaeuser,* 88 C. C. A. 404, 161 Fed. 324, to the point that the Secretary possessed this unlimited discretion to override the law and in response to that argument this court said in the *Daniels-Wagner* case as follows:

"Let us consider the subject from the point of view of the authorities relied on as sustaining the possession of the discretionary power by the Land Department, *first,* from the point of view of the opinion expressed by the Secretary of the Interior, and *second,* from that of the court below in affirming the action of that officer. As to the first, it is to be observed that the only authority referred to was the case of *Hoyt* v. *Weyerhaeuser,* decided April 17, 1908, in the Circuit Court of Appeals for the Eighth Circuit (88 C. C. A. 404, 161 Fed. 324), and that therefore the ruling was not the result of any prior administrative rule or practice of the Department asserting the existence of the administrative authority which the proposition involves. We do not stop to point out that in our opinion the ruling of *Hoyt* v. *Weyerhaeuser* did not sustain the right to exert the discretionary authority which it exercised, since the case, after the action of the Land Department, was reviewed

in this court and reversed upon reasoning which negatives the assumption that the Department possessed the discretionary authority which it assumed it had. *Weyerhaeuser* v. *Hoyt*, 219 U. S. 380, 55 L. ed. 258, 31 Sup. Ct. Rep. 300."

In the *Daniels-Wagner* case the defendants cited *Cosmos Exploration Co.* v. *Gray Eagle Oil Co.*, 190 U. S. 301, 47 L. ed. 1064, as sustaining the wide latitude of discretion claimed by the Secretary in that case, and in this case. This court said:

"But we are of opinion that this interpretation of the *Cosmos* case cannot be justified. In the first place we can discover no reason for holding that the *Cosmos* case either expressly or by any reasonable implication sustained the assumption that there existed in the Land Department in the case of lieu land entries or any other the vast latitude of discretion involved in the proposition which was sustained. It is true in the *Cosmos* case it was d e c i d e d that courts would not interfere with the right of the Department to pass upon a question which it had the power to decide as a pre-requisite to allowing a lieu entry under the act of 1897, but that ruling has no relation to the question of the right of the Department, after it had passed on the prerequisites required for the entry under the act of 1897, and after it had decided that they had all been complied with, to deny the right of the applicant to enter, and under the theory of a discretion possessed to permit a later applicant to take

the land, thus depriving the first applicant of the right conferred upon him by the act of Congress. The difference between the two is that which must obtain between the power to decide, on the one hand, whether the pre-requisites to an entry exist, and the right, on the other, of the Land Department, after finding that an applicant has fully complied with the law and is entitled to make the entry which he asks, to permit somebody else to enter the land under the assumption that the law vests a discretion which enables that to be done."

VI.

Ninth Assignment of Error.

This assignment complains of the adverse decision of the trial court in deciding plaintiff's case was without merit by expressing the decision in three ways, *i. e.*, by holding that the amended bill fails to state facts sufficient to constitute a cause of action, and that the fifth paragraph of the answer (which fifth paragraph was but a general demurrer to the bill) was a good and sufficient defense, and that the fourth paragraph of defense was a good and sufficient defense. The f o u r t h paragraph made the point in defense that Anicker's bonus paid for the lease was insufficient and by reason of that fact he was not entitled to the relief. There was no merit in any of the defenses.

We have already in this brief cited authority to the point that courts of equity may correct erroneous rulings of the executive department when such ruling is based upon a misconstruction of the law as applied to facts found, conceded, or established without dispute at a hearing before the department. Those decisions apply to Indian land matters as well as general public land questions, and the method of relief is to declare the patentee-in-error a trustee for the one who equitably should have been patentee. (*Summers* v. *Barks*, 127 Pac. 402; 36 Okla. 337; *Garrett* v. *Walcott*, 25 Okla. 582, 106 Pac. 848; *Ross* v. *Stewart*, 25 Okla. 617, 106 Pac. 870; *Leak* v. *Joslin*, 20 Okla. 200, 94 Pac. 518; *Wallace* v. *Adams*, 143 Fed. 721; 74, C. C. A. 540.)

An exactly analogous authority conclusive of the point involved in this assignment of error is *Daniels* v. *Wagner*, 237 U. S. 547, 567; 59 L. ed. 1102, already cited and quoted herein.

We have already made some arguments to the point that the question of the adequacy of the bonus paid by Anicker is a question that concerns only Anicker, the Indian lessor and the department as *quasi*-guardian to guard the Indian against improvident contracts; with that question the conflicting lessees have no concern. It so happens that on the matter of adequacy of bonus, Anicker's position is much stronger and more equitable. The department, ap-

praising the bonus as of the date of Anicker's lease, required Anicker to pay $800.00 and he paid it, the $50.00 having been paid the Indian at the execution of the lease and the other $750.00 being deposited with the department. The bonus, as of the date of defendants' lease, was appraised at $600.00 and he paid it all to the department *after Anicker's lease was filed with the department and recorded in the County office.* Anicker's contract was one based on a paid consideration of $50.00 and the promise of $350.00 more, and had inchoate validity *ad interim. Defendants' lease was not based on any consideration at all* and not a cent was paid until, after speculating fifteen days while conditions were changing rapidly and the bonus values were mounting higher, and after Anicker's claim had a status before the department, they risked $80.00. Had Anicker at any time after March 28, 1912, refrained from asking approval or withdrawn his application for approval he would have lost the $50.00 paid the Indian anyhow; the defendants could have refrained from asking approval, *and they did refrain* until April 5th, 1912 *without having expended a single cent for the lease.* Anicker's position before the bonus appraisement was more meritorious and equitable than that of defendants. After appraisement both conflicting lessees paid the required bonus promptly, thus putting all parties on an equality except that Anicker was re-

quired to and did pay $200.00 more than defendants upon the departmental theory that the bonus appraisement should relate back to the dates of their respective leases.

We again insist that the Secretary decided the questions of fact concerning the fitness of Anicker and whether he has complied with the requirements of law and whether the contract with him is provident or improvident. It is d e m o n s t r a b l e to a mathematical certainty that the contract is not improvident. Both lessees were required to and did give ample bond to carry out their contracts.

Anicker's bonus was Eight Hundred Dollars and defendants' was Six Hundred Dollars. The bill and answer show the respective leases *to be identical in terms* and that each party gave a bond for the faithful performance of his duties as lessee and made proper affidavits concerning his financial ability, all as the regulations require. Therefore, unless he compels a decision in favor of defendants against Anicker it is demonstrable that the Secretary must have considered the parties on a par. All official opinions place them on a par. The Secretary states Anicker "*would have the advantage*" if there were any advantage in priority of recording, which would be improper and inaccurate language if Anicker were disqualified to possess such an advantage.

Defendants' counsel below argued with great earnestness the point that the bonus in the Anicker contract had been changed by appraisement of the Department after the making of the Anicker contract, and sought to convince the court that this made it a brand new contract later in date than the filing of defendants' lease. His argument on that point is untenable. It might have been tenable if the Secretary had disapproved all the contracts and required new contracts which could only be effective from the new dates. *The suggested amendment in bonus had relation to the original date of the contract exactly as the appraisements did and the suggestions of the appraisement are all harmonious with the legal principle that the approval, when made, relates back to the original date, and no intervening liabilities will render it inoperative. (Lykins* v. *McGrath*, 184 U. S. 169, 46 L. ed. 170; *Pickering* v. *Lomax*, 145 U. S. 310, 36 L. ed. 716; *Pickering* v. *Lomax*, 173 U. S. 26; *Shulthis* v. *McDougal*, 170 Fed. 535; 95 C. C. A. 615.)

The Department considered both leases and approved the defendants' lease *as of its original date*, which as this Circuit Court of Appeals held in *Shulthis* v. *McDougal*, 95 C. C. A. 615, 170 Fed. 529, it relates back to. It did not approve the contract as a later or amended one of different date from the original.

The contract itself remains unchanged by the requirement of the department for more bonus, *the only change being in the consideration for entering into the contract, as distinguished from the lease contract itself.* The contract itself was in no wise changed, whatever the amount of the bonus or whether there was any bonus at all. As persuasive that the bonus is properly no part of the lease itself the department did not require any change of recital of consideration or the execution of any new leases. The bonus consideration is not really a part of the contract of leasing but is collateral to it. Suppose the department had approved the lease without the bonus being in fact paid? It could be sued for, not as a suit upon the lease contract but upon the collateral or preliminary agreement to pay that much to enter into the contract of leasing. It is closely analogous to the well known distinction between a *contract for an option* to sell or lease, and the contract of sale or leasing itself. (39 Cyc 1179-80, 1232.)

The consideration for the option is quite different from the consideration for the sale or leasing of the property. So in the case at bar the lease itself and the terms embodied therein are the only things the department approves in its written approval, *and the bonus paid is no part of the contract of leasing*, although the departmental guardianship is broadly asserted to require a proper bonus also.

We earnestly insist that only the Indian himself and his Department guardian, *and not defendants*, may raise the point of invalidity.

22 Cyc. 129, says:

> "In Canada the right of Indians to alienate their lands is also restricted."

Note thereto says:

> "See *Boucher* v. *Montour*, 20 Quebec, Super. Ct., 291, holding that the nullity of sales or leases of property on an Indian reserve is only relative and can only be invoked by the Indians; those who have dealt with the Indians cannot avail themselves of it."

If this principle applies here defendants cannot object that the lease to Anicker had not been approved.

In defendants' brief below they contend that the requirement by the United States Indian Superintendent that the bonus be enlarged, and the acquiescence of the parties therein, in effect compelled a departmental rejection of the original contracts, and that the payment of the additional bonus pursuant to departmental requirement made new contracts between the parties or gave them a new status as of a time when Anicker had notice of the defendants' prior lease, and that this operated to destroy Anicker's status as a *bona fide* purchaser of the lease without knowledge of defendants' lease. That con-

tention is very ingenious, but it does not stand the test of logic or square with the authorities, or the record in this case.

We have already touched upon this point, and do not desire to repeat what we said already.

It is neither a necessary nor a fair inference to say that Anicker's lease would have been disapproved in any event.

The contract itself is the lease and the lease only, and *it, and not the consideration leading up to it*, is the thing to be approved by the Secretary. The Secretary never said that the bonus was inadequate, but his adviser, the Superintendent, in passing along the opinion of his subordinate, the Inspector, said that the lessees might at their option deposit additional bonus to conform to the Inspector's opinion. Each side acquiesced in that suggestion. Anicker, whose bonus was originally $400.00 *and partly paid*, increased his bonus payment to $800.00, which just doubled his bonus. The defendants' bonus, which was originally $80.00, *without any of it being paid*, was made $600.00, or multiplied by seven and one-half. It was not inevitable that the opinion of the Inspector would have been followed by the Secretary when the value of the lease to Anicker was placed by him at $800.00, and to the defendants only $600.00, *for exactly the same lease just a few days apart.* But if we assume for argument that the Inspector's

opinion would never have been contradicted, (as it might have been) and that he was giving true values, it does not follow as a necessary result that a sale of a lease for just one-half of what he declared the bonus should be is improvident, especially when the changes were rapid and were based on rumor and excitement, and when opinions on values are necessarily so inconclusive.

Nor does it follow that the leases or the parties acquired a new status as the result of a suggestion calling for additional bonus and the acquiescence of the parties therein. This change of bonus was not even an amendment of the contract *which was the lease*. These leases were never refiled or re-executed, even though the change in bonus was an enlargement *of the consideration for entering into the contract*.

It does not appear that it was the purpose of the Department to make new contracts by calling for more bonus or to initiate new ones; that is beyond the Department's power. The Superintendent, in his letter transmitting the documents and his recommendations to his superiors, said (Rec. 121-122):

> "That all parties might be on an equal footing as to bonus, an investigation was made by the Oil Inspector and from his report it appears that a reasonable bonus for each lease was as follows (stating the figures); and amounts suffi-

cient to make the bonus required in each case were paid into his office."

This report fixes the Anicker bonus at $800.00 and the defendants' bonus for the same lease $600.00, *as of the time when the lease was made*, and this is the reason the Superintendent makes his recommendation as to the bonus as above stated. *If the intention of the Department was for the leases to take a new status as of the date of the Superintendent's request for additional bonus, how could he possibly justify the two different prices of $600.00 and $800.00 for the same lease upon the same date?*

The letter of the two leases contemplates that the parties would conform to departmental regulations, and of course they were subject to departmental regulations lawfully promulgated. The regulations require appraisement for bonus as the defendants say. It was the contemplation of the parties that they would probably conform to such appraisement, and they could not know in advance what the appraisement would be, and when it is conformed to it relates back to the contract as does the approval relate back to the original execution of the lease. (*Shulthis* v. *McDougal*, 95 C. C. A. 615; 170 Fed. 535-6.)

If the defendants' idea be correct, then no lease could ever be made except as the result of a double

attempt. Rule 10 of the Regulations requires that the Superintendent report "upon the adequacy of bonus *paid* for each lease," meaning the bonus *already paid* or stipulated for. There is no machinery provided by regulations for sending an inspector out to appraise values of contemplated leases *before* they are made. That would not be wise, because changing conditions might change the inspector's view and fruitless negotiations might keep a force of inspectors busy on contemplated leases to no purpose. So no appraisement is made until after the lease is filed for approval. This appraisement is made in order to guide the Secretary in guarding the Indian against improvidence, and it is not designed to take the whole matter of negotiating the contract for a lease out of the Indian's hands and vest it in the Superintendent or his Inspector.

Now, the courts have decided that the Department cannot initiate a lease, and the defendants say that the Indian cannot validly do so for want of approval of the Secretary and the appraisement of the Inspector. The Department cannot appraise the bonus until a lease is filed, so if defendants are correct we would have the farce of requiring a first lease to be filed to get the Superintendent's machinery in motion, and then the appraisement of his Inspector on values would follow, after which the parties being advised, may make a new contract to fit the depart-

mental view with a prospect of having it confirmed by the Secretary's approval. This would make the Indian Office a veritable "circumlocution" office.

The law does not give to a contract which is amended by the parties by consent the status of a new contract, but makes the amendment relate back to the date of the original contract.

As has been decided, the Secretary's approval relates back. (*Shulthis* v. *McDougal*, 95 C. C. A. 65; 170 Fed. 535; *Lomax* v. *Pickering*, 173 U. S. 26; *Lykins* v. *McGrath*, 184 U. S. 169, 46 L. ed. 170.)

The question of inadequacy of bonus is one which the Secretary only could raise in passing on the providence of the contract. *He has never suggested this as an objection in the case at bar*, but bases his opinion entirely on other grounds which are law points. Nor could he fairly do so, after his subordinate, the Superintendent, called for more bonus and got it before the case ever reached the Secretary.

The *defendants have no standing to complain of the inadequacy of the bonus paid by the plaintiff, which was a matter which concerned the Indian only* and not the defendants who were third parties.

The requirement and payment of additional bonus does not effect the status of Anicker as a

bona fide purchaser without notice of defendants' lease.

If one buys property and acquires a status as a *bona fide* purchaser without notice of a conflicting conveyance which has been withheld from record, he is not deprived of his status because he and his vendors on further conference agree that he shall pay an additional price for his property. This exact point was decided in *Shulthis* v. *McDougal*, 95 C. C. A. 615, 170 Fed. 537-9.

The whole departmental theory of these leases was that they were passed on, notwithstanding the change in bonus, *as of the dates of their execution.* The decision of the Secretary was expressly based on this difference in dates of the execution, as if the additional bonus had been paid at the time of the execution. Shall the whole departmental decision and the theory undelying it be *struck down* in the hunt for an astute but fallacious theory to *support* the decision?

The defendants contended below, and will probably contend here, that "departmental" leases are absolutely in violation of restrictions and without validity until approved by the Secretary, and (contrary to the decision of the court in *Shulthis* v. *McDougal*, 95 C. C. A. 615, 170 Fed. 535) that they are such nullities that they need not and cannot be recorded. Let us see where this leads us. In Oklahoma

the objection that a conveyance is void because contrary to restrictions may be availed of by a subsequent grantee. (*Simmons* v. *Whittington*, 27 Okl. 536, 112 Pac. 1019; *Chapman* v. *Siler*, 120 Pac. 608, 30 Okl. 714.)

The reasoning of the decisions is that the subsequent grant is a revocation by the grantor of the prior void conveyance and an implied authority to the subsequent grantee to set up the revocation. Applying that to the case at bar, defendants' own lease dated March 20, 1912, was void because not approved and not even filed for approval. The later lease to Anicker on March 28, 1912, *was a revocation by the lessor of defendants' lease. It has never been held that a prior grantee* may set up the alleged invalidity of a later conveyance by his grantor. A second void conveyance may be invalidated by a later conveyance, but never by one made before it.

There is no merit in defendants' contention from any angle.

VII

Tenth Assignment of Error.

This assignment complains of the decree of the trial court against complainant in that the trial court adopted the departmental theory that the departmental regulations requiring leases to be filed

within thirty days, was a regulation *permitting* thirty days' delay without prejudicial consequence, instead of a limitation. This regulation (Rule 2, Regulations of April 2nd, 1908), colloquially called the "thirty-day rule," is as follows:

> "All leases shall be in quadruplicate, and with the papers required, shall be filed within 30 days from and after date of execution by the lessor, with the United States Indian Agent at Union Agency, Muskogee, Oklahoma."

We do not attack the validity of the 30-day rule. Properly construed, and limited to its proper sphere of operation, it is an excellent and valid rule.

The erroneous construction given the 30-day rule is that it is permissive and gives 30 days to file, instead of immediately. The language of the rule is mandatory, not permissive.

The statutes of the United States and the States of Arkansas and Oklahoma applicable hereto declare, in effect, that the lease must be filed at once under penalty of being subordinated to some intervening conveyance. That principle remains, and is to be construed in harmony with the rule above quoted which declares that, unless, as a matter of administrative policy the lease is filed in Union Agency within 30 days, the department will not consider it for approval. To say that it enlarges the time theretofore fixed by statute for filing carries it

beyond the legitimate function of any departmental regulation.

No regulation can add to a statute or conflict with it. It must be harmonious with it and in furtherance of it or it cannot be sustained. (*Williamson* v. *U. S.*, 207 U. S. 454-462.)

In that case the statutes required a certain affidavit in perfecting a land entry and the department made regulations requiring certain additional matter to be incorporated in the affidavit. It was held that such regulation was beyond departmental power and encroached on the legislative power.

In the *United States* v. *McMurry*, 181 Fed. 724, Judge CAMPBELL draws the line between what is departmental regulation, which can be made, and an attempted amendment to the statute which it cannot make, and held an attempted "regulation" required to be incorporated in coal leases, void. He bases the decision in part upon *Morrill* v. *Jones*, 106 U. S. 466, 27 L. ed. 267, which is in point here.

For regulations to be valid they must be within the limits of the law they are to enforce. (32 Cyc, 1006; *Anchor* v. *Howe*, 50 Fed. 336); must tend to its enforcement. (32 Cyc, 1007; *Williamson* v. *U. S.*, 207 U. S. 425, 52 L. ed. 278), and must not be opposed to rights conferred by Congress. (32 Cyc, 1007; *Williamson* v. *U. S.* 207 U. S. 425, 52 L. ed. 278.)

This question was discussed in *Williamson* v. *U. S.*, 207 U. S. 425, 460, 462. Williamson was prosecuted for conspiracy and subornation of perjury in acquiring timber land. The Act under which this land was entered prescribed the requirements to be met by the applicant on the first application, one of which was an affidavit that he was acting for himself alone, and was under no contract to dispose of the land to any one else. The Act further prescribed the necessary conditions on final proof. The law did not require an affidavit of individaul interest at this time. The Secretary, in his regulations, required that at the final hearing the applicant should make similar affidavit as to individual interest as required by the law at the time of filing. The court held this regulation of the Department void on the ground that it was imposing a condition on the applicant not required by statute, and therefore beyond the power of the Secretary. On page 460, after discussing these statutes, the court says:

> "We say this because as the third section re-exacts in the final application the reiteration of some of the requirements concerning the character of the land made necessary in the first application, and omits the requirement as to *bona fides*, etc., of the applicant, it follows under the elementary rule that the inclusion of one is the exclusion of the other; that the re-exacting of a portion of the requirements was equivalent

to an express declaration by Congress that the remaining requirements should not be exacted at the final proof."

On pages 461 and 462, the court says:

"It remains only to consider whether it was within the power of the Commissioner of the General Land Office to enact rules and regulations by which an entryman would be compelled to do that at the final hearing which the Act of Congress must be considered as having expressly excluded, in order thereby to deprive the entryman of a right which the act by necessary implication conferred upon him. To state the question is to answer it. As observed in *Adams* v. *Church*, *supra*, at page 517, 'to sustain the contention would be to incorporate a prohibition against the alienation of an interest in the lands not found in the statute or required by the policy of the law upon the subject.'

"True it is that in the concluding portion of Section Three of the Timber and Stone Act, it is provided that 'effect shall be given to the foregoing provisions of this Act by regulations to be prescribed by the Commissioner of the General Land Office,' but this power must, in the nature of this, be construed as authorizing the Commissioner of the General Land Office to adopt rules and regulations for the enforcement of the statute, and cannot be held to have authorized him by such an exercise of power to virtually adopt rules and regulations destructive of rights which Congress had conferred. As then there was no requirement concerning the

matter in the final proof of an affidavit as to the particulars referred to, and as the entryman who had complied with the preliminary requirements was under no obligation to make such an affidavit, and had full power to dispose *ad interim* of his claim upon the final issuance of patent, we think the motive of the applicant at the time of the final proof was irrelevant even under the broad rule which we have previously in this case applied."

In *U. S.* v. *McMurry*, 181 Fed. 724, the question of the power of the Secretary to make and enforce regulations governing the coal leases in the Choctaw Nation was before the District court, and that court in that case had occasion to review a number of the previous dicisions on this subject, particularily *Midland Oil Company* v. *Turner*, 102 C. C. A. 368, 179 Fed. 74, and *Morrill* v. *Jones*, 106 U. S. 466. In *Morrill* v. *Jones*, Chief Justice WATE said:

"The Secretary of the Treasury cannot by his regulations alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. In the present case we are entirely satisfied the regulation acted upon by the collector was in excess of the power of the Secretary. The statute clearly includes animals of all classes. The regulation seeks to confine its operation to animals of 'superior stock.' This is manifestly

an attempt to put into the body of the statute a limitation which Congress did not think it necessary to prescribe. Congress was willing to admit duty free all animals specially imported for breeding purposes; the Secretary thought this privilege should be confined to such animals as were adapted to the improvement of breeds already in the United States. In our opinion, the object of the Secretary could only be accomplished by an amendment of the law. That is not the office of a treasury regulation."

The question in the *McMurry* case involved the right of the Secretary of the Interior to increase the tonnage of coal to be mined by the lessees within certain specified years. The Secretary by rule, or regulation promulgated, sought to increase the number of tons of coal the leesses should mine in a given number of years, or pay royalty per ton on the increased basis. In holding that the Secretary had no such power, the court said:

> "If he may arbitrarily fix this tonnage, why may he not fix any tonnage, even that which would be prohibitive of operation, and thus defeat the very object of the Act itself. Such a power will not be presumed to exist except it be cleary granted. Congress did grant him the power to change the per ton output royalty to such extent as he might deem to the best interest of the tribes. If it had intended that he might also arbitrarily fix the minimum amount

of coal to be mined, regardless of existing conditions, that too could and should have been clearly granted, and the fact that it was not persuades me that it was not intended, especially when it is considered that Congress, contemplating more or less delay in beginning operations, provided for stipulated advance royalties pending such delay."

Now, by the same process of reasoning, we may say that if the Secretary has the power to suspend the force and effect of the registration laws for thirty days, so far as they effect the oil and gas lessee, why has he not the power to suspend those laws for three months or six months or a year? Is there anything in the Act of Congress relating to the execution of oil and gas leases in this state by which such a grant of power might be reasonably implied? We think not. If Congress had intended or thought it wise to confer such power on the Secretary, it could easily and probably would have done so. On the contrary, instead of granting such power, Congress expressly placed in force very early in the development of oil and gas in this Territory the recording acts of Arkansas, which the Circuit Court of Appeals in *Shulthis* v. *McDougal*, 95 C. C. A., 615, 170 Fed. 529, held applied to leases of the character involved in this case, and Congress later, by the act of March 1, 1907, by an additional provision declared that the filing of leases with the Union

Agency at Muskogee should be notice, thereby manifesting in the strongest possible manner the intent and purpose on the part of Congress that conveyances of this character should be subject in every respect to the registration laws in force in this country.

As stated by the Supreme Court in *Williamson* v. *U. S. Supra*, "the elementary rule that the inclusion of one is the exclusion of the other," the fact that Congress by positive enactment declared that these leases should be subject to the recording acts in force, expressly excluded that idea that the Secretary of the Interior or any other power, except Congress itself, could by law or regulation suspend the recording acts and deprive individuals of the benefits afforded thereby with reference to oil and gas leases.

In *United States* v. *Symonds*, 122 U. S., 46, 49, the power of the Secretary with reference to making regulations in relation to the Navy was before the court. On page 49 of the opinion the court says:

> "The authority of the Secretary to issue orders, regulations and instructions, with the approval of the President, in reference to matters connected with the Naval establishment, is subject to the condition, necessarily implied, that they must be consistent with the statutes which have been enacted by Congress in reference to the navy. He may, with the approval of the President, establish regulations in execution of, or supplementary to, but not in conflict with,

the statutes defining his powers or conferring rights upon others. The contrary has never been held by this court."

Counsel for defendants contended in the court below that the thirty-day rule or regulation must be construed as permissive of a delay in filing of not over thirty days upon the idea that it is impracticable to get all quadruplicate parts of a lease with the accompanying papers ready for filing in less than thirty days. We have here the physical fact that Anicker got his papers ready and filed them in the department the second day without its being a sensational feat of speed. Defendants could easily have been as prompt had they not deliberately chosen to delay payment for a while that they might watch developments at the Indian's expense.

But as a conclusive answer to the fallacious contention just mentioned, we cite a regulation made by the Secretary of the Interior on this subject, promulgated May 12, 1913, to be effective June 1, 1913, of which the courts take judicial notice, which *remains in force concurrently with the same old regulation* called the thirty-day rule, and which reads as follows:

"*Sec.* 2. All leases shall be in quadruplicate, and with the papers required, shall be filed within thirty days from and after the date of of execution by the lessor, with the United States

Indian Superintendent at Union Agency, Muskogee, Oklahoma.

"Assignments of leases and stipulations modifying the terms of existing leases shall also be filed with said Superintendent within thirty days from and after the date of execution.

"A filing fee of $5 for each lease and each assignment, and $2 for each stipulation modifying the terms of existing contracts is hereby required, and shall accompany each lease, assignment or stipulation from and after June 1, 1913. Such fees shall be accounted for by the disbursing agent of Union Agency as miscellaneous receipts Class IV, subject to disbursement under the regulations governing such funds.

"*Within twenty-four hours after the execution by an Indian lessor of an oil, gas or other mineral lease*, which requires the approval of the Secretary of the Interior, *the lessee must either file in the office of Superintendent of Union Agency* or deposit in the mails addressed to said Superintendent a notice of the execution of such lease, signed by the lessee or his agent upon a form furnished with the lease blanks, showing date and hour of execution, description of land, names of parties, character of lease, etc. It is preferred that these notices be sent by registered mail. If not so sent, other proof of mailing may be required. Immediately upon receipt of such notice by the Superintendent, entry thereof will be made in the same manner as leases are indexed for the information and notice of the public. Failure to file the lease within thirty days from and after the date of execution, will be

considered an abandonment thereof, and the land may be leased to other parties."

It is impossible for the thirty-day regulation to co-exist with the later regulation if it be construed as permissive instead of a rule of limitation. A rule that a lease must be filed within twenty-four hours and yet need not be filed until the end of thirty days would be a flagrant contradiction. But a rule that leases must be filed in twenty-four hours and that they will have no standing at all to ask for departmental approval unless filed within thirty days, is sensible. If the thirty-day regulation be interpreted as one of limitation purely, it coincides with all congressional enactments and the later regulation, and such is its only rational interpretation.

We would not be understood as questioning either the legality or the advisability of the Departmental regulation referred to as the thirty-day rule; we merely contend that it has been given an effect contrary to the law of the land as declared by plain Congressional enactments and the decisions of the courts interpreting the same. In our view the proper and only legal interpretation that can be put upon the Departmental regulation is to hold that *as between the proposed lessee and the government* (the government being *quasi*-guardian of the Indian) the lease must be recorded within thirty days. The only

purpose of this recording is to enable the government to keep in touch with the state of the ward's affairs and it has no relation to or bearing upon the rights of conflicting claimants. On the other hand, the recording statutes of the States, as extended and put into force by Act of Congress, (whether the Arkansas or Oklahoma law be applicable—they are alike in principle and requirement) are the only and efficient means of protecting the third parties who may become *bona fide* purchasers of a leasehold interest in the property. A lessee may arbitrarily wait until the thirtieth day of the thirty days allowed by the regulations to file his lease, so far as the government is concerned, but *as between himself and the public he must record his lease with the promptness necessary to charge purchasers under the recording laws extended and put in force* by Congress; to protect himself from harm, under both aspects, the lessee should heed the law of the land as well as the Departmental regulation, both of which co-exist for the protection of him and the public.

It is much the more reasonable conclusion to believe that the Secretary designed this regulation to operate concurrently with the Acts of Congress. It must have been in the Secretary's mind that a lessee who was granted by the rules and regulations thirty days from the date of the execution of a lease to present the same to the Indian Superintendent for

his action, and who availed himself of the provisions of the rule, did so cognizant of the law of the land providing that grantees in conveyances, who refrain from promptly filing their conveyances for record, do so at their peril. It would be manifestly illegal, unjust and inequitable to say that a lessee may take his lease and withhold filing the same for the period of 30 days and yet be free from the peril incident to the failure to file the same for record when received, as required by specific Acts of Congress.

In the case of a lessee he has the means of protecting himself in his own hand, to-wit: the filing of a lease, or one of its parts, for record in the county in which the land is situate. Other persons desiring to either buy or lease lands have the right under the law, after searching the records and finding no record of any conveyance of the land sought to be purchased, to presume conclusively that no conveyance affecting the same has been made.

The Indian Superintendent cites, as supporting his conclusion in this case, while it was before the department, the case of *Simmons et al.* v. *Whittington*, 27 Okla. 536, 112 Pac. 1018.

In that case the question was the validity of a regulation of the Secretary of the Interior with reference to removal of restrictions to become effective thirty days after the date of the approval of the ap-

plication for such removal by the Secretary. The court in that case upheld the right of the Secretary to prescribe a rule to make his action touching the removal of restrictions effective thirty days after the approval was given.

Our contention is that this case is not analogous to the case now being considered. The reason it is not analogous is that in our view the Secretary in prescribing the rules and regulations which were being considered by the court in that case, was acting *in conformity to and in consonance with* an Act of Congress which authorized him to remove restrictions and to provide the *modus operandi* for removal, and the rules and regulations provided under that statute do not conflict with any other statute and would fall if they did. In this case, according to our view, the Secretary is making or seeking to make a regulation of the Department, which, as construed by the Department *is in direct conflict with Acts of Congress*, to-wit: Acts of Congress requiring instruments to be placed of record to make them effective against subsequent innocent purchasers for value, without notice.

The Circuit Court of Appeals in the case at bar states (Rec. 140) that "the rule of the Department giving 30 days for the filing of leases at the Indian Agency has been in force for many years. As the

Secretary states in his opinion 'it is suited to the conditions in which the oil and gas lease business is carried on. In many cases a considerable time is required after the lessor's signature is obtained for execution by the lessee and in making bond and other papers'." While the making of bond and other papers is required and necessary to entitle a lease to Departmental approval, it does not follow that the lease itself, the moment it is made, may not be filed in the Department or recorded in the recording office for the purpose of giving notice. Indeed, the Act of Congress of March 1, 1907 (34 St. 1015), provided expressly "the filing heretofore or hereafter of any lease in the office of the United States Indian Agent, Muskogee, Indian Territory, shall be deemed constructive notice." That does not provide that the bond must be filed to give notice or any other papers than the lease itself must be filed. The language of the 30-day rule is one of limitation and is easily understood to be such. *It is not one permitting 30 days for filing.* That construction is opposed to the rule itself and also is opposed to the purpose and common sense of the circumstances calling for the rule. The purpose of the rule is to require prompt filing and not to give 30 days speculative delay. The rule *requires* the leases to be filed in *not more than 30 days.* The interpretation placed by the Department in this case is not supported by any

prior similar interpretation and offers a premium upon speculative delay to the extent of 30 days, whereas the design and the language of the rule both require diligence and fixes 30 days as the period beyond which delay cannot be had, and beyond which it is conclusively presumed to be beyond the pale of diligence. The act of March 1, 1907, just quoted, is absolutely inconsistent with the idea that the 30-day regulation is permissive instead of a matter of regulation, because it is impossible for a lease to be deemed constructive notice without being filed if it is to have the benefit of filing at any time within 30 days after date.

The defendants' brief below made the point most astutely that the Secretary made no decision ON the recording laws, but admits that he decided the case *without regard* to the recording laws. They boldly follow the Secretary in his claim to omnipotence and his claim that the laws enacted by Congress can have no application to his jurisdiction if he makes and construes a regulation that happens to be in conflict with them. They admit that the Secretary waived aside the recording laws as not meriting his consideration, but contend that because of that fact he did not *construe or interpret* them, and hence that his decision was not ON the law and therefore must have been made *on the facts* and against Anicker on the facts. This contention is both unsound and a

non sequitur. When the Secretary waived aside the recording laws, he considered them at least momentarily, and he decided AGAINST them even if not ON them. Whether his decision was ON the recording laws or merely AGAINST them, it was a decision OF LAW and not a *decision on the facts.*

The defendants well knew that the Secretary's decision was a decision OF LAW as distinguished from a decision of fact, because when they saw plaintiff's amendment to his petition to prevent any issue on the facts in the federal court, they amended their answer (Rec., 77) to make their answer in effect a cross bill and an assault *by the defendants* on the Departmental decision, by alleging that it was based on a gross mistake of fact and that the Secretary fell into a misapprehension of the facts before him.

This action of the defendants is an example of agility in changing front that challenges admiration, because they claim in the pleadings that the decision of facts was *against them* and grossly erroneous, and now they elaborately reach the conclusion that the Departmental decision was on the facts and *in their favor.*

We admit that the recording laws "cannot control the discretion of the Secretary" for *against the recording laws he has no discretion.* He must heed and obey and give effect to the recording laws, like

all other laws. His discretion is unlimited only on the facts. He has no discretion as to the law except such as may be reviewed by the courts. It was his clear duty to give force and effect to the recording laws and exercise his discretion in harmony therewith. His assumption that the law cannot apply to him or to his discretion, fails to carry conviction in the correctness of such assumption.

Conclusion.

We respectfully submit that for the several reasons hereinabove assigned the decree of the United States District Court for the Eastern District of Oklahoma and of the Circuit Court of Appeals for the Eighth Circuit, are erroneous and should be reversed, and that a decree should be here rendered holding the defendants to be trustees for plaintiff Anicker of the lease in question and that the cause be remanded to the District Court to state an account between the parties and requiring defendants to account for their acts and doings as such trustees during all the time of said trust, including an accounting for all incomes, rents and profits from the leased property.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1917.

WILLIAM J. ANICKER, Appellant,
vs.
DAVID GUNSBURG AND SOUTHWESTERN PETROLEUM COMPANY, Appellees.
No. 164.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

APPELLANT'S REPLY BRIEF.

JAMES W. ZEVELY,
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OCTOBER TERM, 1917.

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APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

APPELLANT'S REPLY BRIEF.

I.

While a government approval of the lease was necessary to insure complete validity, the right of the Indian to first execute, and the duty of the lessee to then file and record it, were in no wise dependent thereon. This because the sole purpose of the approval was to protect the Indian against improvidence. Hence the approval whenever or however given, conditional or unconditional, related back to and was effective from the time of execution.

This proposition is sound and sustained by reason and abundant authority. It stands as the foundation upon which the appellant's case rests. It was entirely

ignored below and is scarcely noticed in appellees' extended argument. Yet the case can never be properly approached nor the law properly applied without a thorough understanding thereof and a full appreciation of its effect.

(1.) Approval by the Government was, to insure complete validity, a necessity.

There was, of course, to insure complete validity, a *necessity* for the approval of a lease by the Secretary, because section 20 of the Act of Congress of April 20, 1906 (34 Stat. L. 145) and section 2 of that of May 27, 1908 (35 Stat. L. 312) expressly so provided. An approval can, of course, be conditional or unconditional. If conditional, as for instance, calling for any additional bonus, the condition must be complied with.

(2.) Purpose of the approval.

The *sole* purpose of the approval is, however, only to protect the Indian against his own improvidence. When that protection is accorded, all concern of the government absolutely ceases. This has been so often decided that no room is left for discussion (*Pickering* v. *Lomax*, 120 Ill. 289, 11 N. E. Rep. 175, per Sheldon, J.; *Pickering* v. *Lomax*, 145 U. S. 310, 36 L. Ed. 716; s. c. on second review, 165 Ill. 431, 46 N. E. Rep. 238, 173 U. S. 26, 43 L. Ed. 601, 602; *Lykins* v. *McGrath*, 184 U. S. 168, 171, 46 L. Ed. 485; *Gannon* v. *Johnstone*, 243 U. S. 108, 111, 61 L. Ed. 559; *Shulthis* v. *McDougal*, 95 C. C. A. 615, 170 Fed. Rep. 529; *Moore* v. *Sawyer*, 167 Fed. Rep. 826; Bledsoe Indian Land Law, 2nd Ed. sec. 165; *Brader* v. *James*, (Okla.), 154 Pac. Rep. 560,

562; *Scioto Oil Co.* v. *O'Hern*, (Okla.), 5 Oklahoma Appellate Court Reporter, 81).

The last of the foregoing cited cases, decided December 11, 1917, *after* the original brief herein was prepared, as a result of the repeated decisions of this and other courts, thus summarized the purposes of the approval.

> "The purpose of requiring the lease to be approved by the secretary was to see that the allottee should not be wronged in any lease he might desire to make and that the consideration should be ample and that the lease be subject to no unreasonable qualifications. It was not to prevent the leasing of the premises but to guard against imposition therein, and when the secretary approved the lease it was a determination that the purpose for which the restriction was imposed had been fully satisfied; that the consideration was ample and that there were no unreasonable stipulations contained in the contract."

This doctrine was here recognized as late as December 10, 1917. (*Sweet* v. *Schock*, U. S. Adv. Op's 1917, p. 132.)

It is necessary to appreciate the *purpose* for which the approval is required. Where that is accomplished and the Indian is protected against improvidence, the Secretary, if he undertakes to apply the law, must make a correct application thereof. He is not invested with power to do more than approve or disapprove. He does not make the contract. He does not choose the lessee. He, by his approval, is simply to protect the Indian against his own improvidence. When that is done, the law takes its course.

The sole purpose of the approval is made perfectly plain by the history of the legislation.

Long prior to the adoption of the Act of April 26, 1906 (34 Stat. L. 145) and May 27, 1908 (35 Stat. L. 312) referring to the approval of Indian leases, and before there was any legislation to divide the tribal lands among the Indian citizens in severalty, the Creek tribe, as it was authorized to do, directly legislated (Constitution and Laws of Muskogee or Creek Nation, p. 127; Acts and Resolutions of the Creek Council, 1900, p. 29) as to the leasing of Indian lands, leaving the Indians the right to make their own contracts under their own tribal laws. This is manifest by the Act of March 1, 1889 (25 Stat. L. 783) and the proviso thereof repealing "all laws having the effect to prevent the Cherokee, Choctaw, Creek, Chickasaw and Seminole Nations, or either of them, from lawfully entering into leases or contracts for mining coal for a period not exceeding ten years." Coal mining was then a business in that territory, and in 1889 oil had not been discovered there. Thus the Indians decided for themselves how, when and to what extent they would deal with the use of the land.

That condition existed until June 28, 1898, when Congress, without the consent of the Indian tribes affected, passed the Act of that date commonly called the "Curtis Act" (30 Stat. 495), which withdrew all such power from the Indians and provided (sec. 13 thereof) as follows:

> "That the Secretary of the Interior is hereby authorized and directed from time to time to provide rules and regulations in regard to the leasing of oil, coal, asphalt and other minerals in said

Territory, and all such leases *shall be made* by the Secretary of the Interior."

The Indians became dissatisfied with that annulment of their power over their own lands, and the several tribes negotiated treaties or agreements with the United States Government. The Creek Agreement, commonly called "the Original Creek Agreement" is embodied in the Act of Congress of March 1, 1901 (31 Stat. L. 861) and was later ratified by the Creek Nation. This Creek agreement, like other similar tribal agreements, allotted the lands in fee simple to the citizens of the Creek Nation, with power to lease, sell and otherwise dispose thereof, subject to the limitations and restrictions therein contained. These restrictions varied with the degrees of blood and other circumstances. They only made such alienations subject to the approval of the Secretary of the Interior and they have been modified from time to time, by removing same from certain classes and individuals. The system last described has prevailed from 1901 to this time and was that in force when the leases here in litigation were executed. It is apparent from the very language and nature of these Acts of 1901 and since, that the purpose of departmental approval was merely to guard the Indian against improvidence, for as fast as classes and individuals were deemed able to contract without such quasi-guardianship, they were freed from restrictions by legislation and Secretary's orders, whereby official power over them and their contracts was completely withdrawn. This power to approve, whenever it came under consideration of the courts, has been deemed merely a veto, only for the purpose of protecting the Indian against improvidence, and it has never been construed otherwise.

(3.) When the approval can be made and the effect thereof.

Because of the *purpose* requiring it, this approval can be had *after*, as well as *before*, the execution and *filing* or *recording* of the lease. When so had, the *approval* relates back to the time of the *execution*. So the authorities last cited (*supra*, subd. 2, especially *Lykins* v. *McGrath*, 184 U. S. 169, 170, 46 L. Ed. 485, 487), with unanimity say, and so it was with emphasis clearly stated in well considered Oklahoma (*Almeda Oil Co.* v. *Kelly*, 35 Okla. 525, 130 Pac. 931) and Kansas (*Ingraham* v. *Ward*, 56 Kan. 550, 44 Pac. Rep. 14) cases. The principle was recently *here* (*Wellsville Oil Co.* v. *Miller*, 243 U. S. 61, L. Ed. 559) applied by deciding that a county court could order the execution of an instrument by a minor *before*, but subject to, a governmental approval *thereafter* to be had. In a very recent case (*Scioto Oil Co.* v. *O'Hern*, Okla., 5 Oklahoma Appellate Court Reporter, 81, 83-84) on the subject, the state court, after stating in the language hereinbefore quoted "the purpose of requiring the lease to be approved," said:

> "When this was accomplished justice requires that the lease should be upheld and to that end the doctrine of relation attaches to the approval of the lease and makes it operative *as of the date of the execution thereof*. The situation is very much like that where a deed has been fully executed and placed in escrow to be finally delivered on performance of a condition * * * ."

II.

In order to preserve any right, as against a subsequent lessee, the holder of a lease of Indian land must either record or file it.

(a) *Provision as to recording.*

Section 20 of the Act of Congress of April 26, 1906, (34 Stat. L. 145) required the appellees' lease, to preserve it as against the rights of a subsequent lessee, to be *recorded* in conformity to the laws of the *then* Indian Territory. This also meant, in view of subsequent legislation, that such recording must *now* be in accordance with the law of Oklahoma. The mere suggestion of counsel to the contrary (Appellees' Brief 145), does not commend itself for it is based upon neither reason nor authority. The Act of February 19, 1903 (32 Stat. L. 573) put in force in the Indian Territory the recording laws (Mansfield's Digest of the Statutes of Arkansas, 1884) of Arkansas, so that they were in fact made applicable by the Act of April 26, 1906 (34 Stat. L. 145). In 1907 that territory became a part of a *new* state. Sections 1 and 21 of the Enabling Act (34 Stat. L. 267, 277) admitting Oklahoma, as a state, and section 2 of the schedule to its constitution (Snyder's Compiled Laws of Oklahoma, 1909, p. 137), if *general* language could do so, substituted the recording laws of Oklahoma (*id.*, sec. 1195) for those of the Indian Territory mentioned in the Act of April 26, 1906 (34 Stat. L. 145). This was heretofore shown (Original Brief of Frank Hagerman, pp. 12-17; Appellant's General Brief, pp. 128-35), and has since been expressly decided (*Scioto Oil Co.* v. *O'Hern*, 5 Oklahoma Appellate Court Reporter 81.) It

is an undisputed fact that there was never any recording of defendant's lease. Hence the Act of April 26, 1906 (34 Stat. L. 145) was never complied with. The lack of the Secretary's approval was, however, no excuse for the failure to so *record* (*Shulthis* v. *McDougal*, 95 C. C. A. 615, 170 Fed. Rep. 529; *Pickering* v. *Lomax*, 145 U. S. 310, 36 L. Ed. 716; 173 U. S. 26, 48, 43 L. Ed. 601, 602). If, therefore, appellant was an innocent subsequent lessee, as he is presumed (Brief of Frank Hagerman, 38-40) and by the department was decided to be, and his lease was practically approved, his rights were superior to those of the defendants under their unrecorded instrument, unless they are saved, not by some *rule*, but by some *statute*.

(b) *Provision as to filing.*

Notwithstanding a lack of *actual* notice and a failure to give other notice by conforming to the state recording law, constructive notice could also have been given by a *filing* pursuant to the Act of March 1, 1907 (34 Stat. L. 1026) with the Indian Department (*Scioto Oil Co.* v. *O'Hern*, Okla., 5 Oklahoma Appellate Court Reporter, 81). This was not done by defendants, so that if plaintiff had the equivalent of an approval, his rights were, equitably, *prior* and *paramount* to those of the defendants. He contracted in good faith without any notice of their claim, making a lease, which so far as concerned the providence of the Indian, met the approval of the department. This as a matter of law gave him a right which the courts should protect.

(c) No departmental rule can stand if in conflict with a statutory requirement (32 Cyc. 1006; *Morrill*

v. *Jones*, 106 U. S. 466, 27 L. Ed. 267; *United States* v. *Symonds*, 120 U. S. 46, 49, 30 L. Ed. 557, 558; *United States* v. *Eaton*, 144 U. S. 677, 36 L. Ed. 591, 594; *Williamson* v. *United States*, 207 U. S. 425, 462, 52 L. Ed. 278, 297; *Balfour* v. *Sullivan*, 10 Saw. 104, 17 Fed. Rep. 579; *Iselin* v. *Hedden*, 28 Fed. Rep. 416, 418; *Siegred* v. *Pueps*, 14 Saw. 363, 40 Fed. Rep. 660, 661; *Anchor* v. *Howe*, 50 Fed. Rep. 366, 367; *Anglo-Cal. Bank* v. *Secretary of Treasury*, 76 Fed. Rep. 742, 749, 750, 22 C. C. A. 527; *United States* v. *Goodsell*, 84 Fed. Rep. 155, 156; *United States* v. *McMurray*, 181 Fed. Rep. 723, 730). There should not be even a suggestion that it can be construed so to do, because no rule or regulation can be upheld by construing it to be unlawful or contrary to existing statutes. Moreover, no *unreasonable* rule can ever be enforced (*Anchor* v. *Howe*, 50 Fed. Rep. 366, 367). The rule, as already shown (Appellant's General Brief, pp. 218-34; Brief of Frank Hagerman, pp. 21-27) should be construed to mean that a lease would not be considered for approval unless actually filed within thirty days, not as *extending* the time within which the statutory constructive notice could be given. To so *extend* the time indirectly *amends* the statute. This, as already shown, would make the department *superior*, not subordinate to Congress.

III.

The effect of the Secretary's action was to approve plaintiff's lease. However, he erroneously construed the departmental rule to prevent him from actually stating that he did so approve it. Herein he erred in a matter of law, in favor of one lessee as against another so that the latter can charge him as his trustee.

This subject has already been fully discussed (Appellant's General Brief, 125-6; Original Brief of Frank Hagerman, 27-38). If this proposition be sound, then it answers nearly every suggestion made in defendants' extended, ingenious and able brief. This because, if as a matter of fact, and in substance, plaintiff's lease was approved, save and except for an erroneous decision of the law, the error should be here corrected by declaring that defendants hold their lease in trust for plaintiff. In determining the question of approval, it is to be remembered that the *only* necessity therefor was *to protect the Indian against his own improvidence*. With nothing else was the Secretary concerned.

(a) *The Secretary did, in fact, approve plaintiff's lease.*

This particular subject has been (Appellant's General Brief, pp. 63-71; Brief of Frank Hagerman, 32-38) so elaborately discussed that nothing need be added thereto. This is a case, if ever there was one, where the facts *force* the conclusion that plaintiff's lease was not improvident, and was, in all respects, deemed satisfactory. It was, however, rejected *solely* because of the erroneous effect ascribed to a departmental rule. If

this view was erroneous, then plaintiff's lease was in law approved. Such is the doctrine of *Johnson* v. *Towsley*, 13 Wall. 72, 91, 20 L. Ed. 483, where a right, which otherwise would have been granted, was denied solely because of a misconstruction of the law.

(b) *If, as a matter of law, the Secretary erred in his construction or application of a departmental rule, defendants took their lease in trust for plaintiff as the true owner.*

This question has already had extended consideration (Appellant's General Brief, pp. 125-6; Brief of Frank Hagerman, 27-31). The authorities, to this effect, speak in no uncertain terms (*Shepley* v. *Cowan*, 91 U. S. 340, 23 L. Ed. 427; *Moore* v. *Robbins*, 96 U. S. 530, 24 L. Ed. 851; *Hawley* v. *Diller*, 178 U. S. 476, 490, 44 L. Ed. 1157, 1162, 1175; *Johnson* v. *Riddle*, 240 U. S. 467, 474; *Frellsen* v. *Crandell*, 217 U. S. 71, 78, 54 L. Ed. 670, 674; *Johnson* v. *Towsley*, 13 Wall. 72, 91, 20 L. Ed. 483; *Southern Pacific R. Co.* v. *Dull*, 22 Fed. Rep. 489, 500; *Bogan* v. *Mortgage Co.*, 63 Fed. Rep. 193, 195; 11 C. C. A. 128; *Germania Iron Co.* v. *James*, 89 Fed. Rep. 811, 816-17, 818, 32 C. C. A. 348, 354, 355; *James* v. *Germania Iron Co.*, 107 Fed. Rep. 597, 601, 46 C. C. A. 476, 479; *Wallace* v. *Adams*, 143 Fed. Rep. 716, 721, 74 C. C. A. 540; *Garrett* v. *Walcott*, 25 Okla. 582, 106 Pac. Rep. 848, 851; *Ross* v. *Stewart*, 25 Okla. 617, 106 Pac. Rep. 870, 872; *Leak* v. *Joslyn*, 20 Okla. 200, 94 Pac. Rep. 518, 520; *Robinson* v. *Owen*, Okla. 484, 119 Pac. Rep. 995, 999; *Summers* v. *Barks*, 36 Okla. 337, 127 Pac. Rep. 402). These cases all teach the doctrine of *Johnson* v. *Towsley*, 13 Wall. 87, 88, 20 L. Ed. 485, that when "but for this (an erroneous)

construction of the statute on that subject" plaintiff's lease "would have received" the stamp of approval, he is, in this form of action, entitled to recover. Here the Secretary found no fault with plaintiff's lease. He was satisfied therewith. If, under the *filing* laws, plaintiff could obtain any advantage, the Secretary said (Rec. 54) that he "was entitled to that advantage." The *sole* reason for not giving it to him was the legal conclusion that under the departmental rule, *as erroneously construed*, defendants were *absolutely* entitled to thirty days in which to *file* their lease, during which period plaintiff could acquire no rights, receive no departmental approval and have no benefit of existing *filing* and *recording* laws. Under these facts, the principle established by the foregoing cases, should be applied.

IV.

Defendants' brief departs from and abandons the erroneous view adopted below (Opinion Rec. 138, 141 C. C. A. 176; 226 Fed. Rep. 176) and seeks to sustain the decree there entered upon new and different grounds.

(a) *Ground of recovery below which is now abandoned.*

Plaintiff's recovery was below, really denied (Opinion, Rec. 138; 141 C. C. A. 176, 226 Fed. Rep. 176) *solely* because a departmental rule was *erroneously construed* to give the defendants thirty days in which to file their lease, prior to the expiration of which period neither plaintiff nor any one else could acquire any rights. Such a construction not only made the rule unreasonable but also made it so conflict

with the statute as to render it void. This question has already been fully discussed (Appellant's General Brief, pp. 219-24; Brief of Frank Hagerman, pp. 21-27.) No attempt has been made to answer the argument. The most that counsel say (Appellees' Brief, Point Eight, pp. 144-5) is that the Secretary had *power* to make rules. That much is conceded. The *point* is that he never made and had no power to make one which was unreasonable or conflicted with the statute. The latter required a lease to be *forthwith* filed and recorded; the rule, *not* as *written*, but as erroneously *construed*, gave thirty days in which to so do, and prevented any one else from, in the meantime, acquiring any rights. Herein is the fundamental vice in the view expressed both by the department and the lower court. Counsel expend no energy in defense of that theory. It is a fair inference that it cannot be defended and that the position is *now* abandoned.

(b) *New and additional grounds now invoked by defendants.*

Notwithstanding this shifting of ground and abandonment of the theory on which the case was really heretofore won, counsel now seek to uphold the decree upon *these* several *other* grounds, the very *number* of which spell weakness:

(1) The action of the Secretary in approving or disapproving a lease, even if based upon a plain error of law, cannot under *any* circumstances or in *any* proceeding, be, thereafter, ever questioned. (Appellees' Brief, Points One, pp. 9-36, Two, pp. 37-49, and Three, pp. 49-69).

(2) The plaintiff, to recover, must have had a *vested* right to an approval of his lease, which the Secretary, *by error of law*, refused to recognize. (Appellees' Brief, Point Four, pp. 69-79).

(3) The bonus of each lease, as it existed at the time of its execution, was thereafter increased, wherefore it is to be *conclusively* presumed that plaintiffs lease never was and never could have been approved. (Appellees' Brief, Points Five, pp. 79-105, and Six, pp. 105-107).

(4) Upon the evidence taken before the department, the Secretary *should have* held and this court, without any proper issue having been made, should *now* hold, that plaintiff took his lease with actual notice and, therefore, was not, as against defendants, entitled to an approval thereof (Appellees' Brief, Point Seven, pp. 107-143).

(5) The *recording* referred to by section 20 of the Act of April 26, 1906 (34 Stat. L. 145) could not have been done, because that act provided for same to be as required by the laws of the Indian Territory, which Territory, theretofore had ceased to exist because it became part of the *new* State of Oklahoma. (Appellees' Brief, Point Nine, pp. 146-156.)

(c) Ingenious and painstaking arguments upon each of these points are *now* advanced to sustain a decree below, resting alone upon a confessedly erroneous construction of a departmental rule. To avoid any confusion and misunderstanding arising therefrom, a few words in reply may be necessary, and to that end the remaining divisions of this reply brief will be directed.

V.

Defendants' first, second and third points (Appellees' Brief, pp. 9-36, 37-39, and 49-69) cover the first of these questions thus brought into the case, which is that the action of the Secretary is final and conclusive, no matter how far it departs from the undisputed or specially found facts, the recognized rules of law, and the purposes for which his approval was required.

(a) Such is the view which defendants now seek to enforce. It is not entirely new, for it was in a confused way hinted at by the court below, (Opinion, Rec. 138), though the result there actually reached was through a misconstruction of a departmental rule. The purpose of calling for an approval was, already seen, only to protect the Indian against improvidence. When, in the judgment of the Secretary, that purpose was accomplished, *the law made that act an approval*, even though words designated it as a "disapproval". When one, to this extent, obtains an *approval* of his lease, the Secretary cannot deprive him thereof by any misconstruction of a rule or erroneous application of law, or by the exercise of powers beyond the *purpose* for which they are permitted to be invoked. This is axiomatic and no refined distinctions or partial quotations from opinions can gainsay the conclusion. The rights of individuals are involved. Property cannot be thus confiscated.

(b) If upon the undisputed or specially found facts, any department erroneously so declares the law as to deprive any one of his rights, the wrong will by the courts be promptly righted. The vice in the reasoning to the contrary is that the theory of plaintiff's case is not understood. Plaintiff, as the law authorized,

leased land from an Indian. That contract, so far as was necessary to protect the Indian against his own improvidence, was in fact approved by the Secretary. The latter did not, however, in words, call it an approval. This, because a departmental rule was erroneously construed to prevent plaintiff, during a certain period, from acquiring any right. Without that rule, as thus construed, plaintiff was, in the opinion of the Secretary, entitled to the lease. This, if the decision was wrong, fixed a *right* and made defendants trustees, as fully and completely as ever was done in any of the cases heretofore here decided or as by any statute could have been done.

As decided in *Johnson* v. *Towsley*, 13 Wall. 72, 91, 20 L. Ed. 483, plaintiff has a case because it is apparent that but for the erroneous construction of the departmental rule, his lease would have been accepted instead of that of defendants.

(c) As to defendants' contention (Appellees' Brief, 9), that the Secretary has such omnipotent power that his *erroneous* application of the law to Indian leases is beyond the control of any court, it need only be said *there is no such power*. (*Daniels* v. *Wagner*, 237 U. S. 547, 567, 59 L. Ed. 1102.) The discretion to be exercised by the Secretary, related to *private* rights and was "quasi judicial". It is clearly distinguishable from that which is "executive" or "administrative" and which deals with political or strictly governmental questions. The distinction has already been pointed out. (Appellant's General Brief, 166-170; Brief of Frank Hagerman, 31.)

Louisiana v. *McAdoo*, 234 U. S. 633, 58 L. Ed. 1506, is relied upon (Appellee's Brief, p. 19). That case purely and obviously involved the discretion of

the Secretary of the Treasury to interpret a tariff act, and whether his discretion could be controlled by *original* proceedings here. Leave to file the petition was denied because the action was really one against the United States. All else said was *obiter dictum*. But otherwise there is nothing in the case which bears upon any question here involved. Mr. Justice Lurton correctly stated the law to be: The courts refuse to *substitute* their judgment or discretion for that of the official to whom it is committed. This they were in that case asked to do. This too *while the officer still had jurisdiction of the matter*. Such a course, if permitted, would suspend the functions of government. Manifestly, the Secretary's interpretation of the tariff law could be reserved by proper protests or other form of action reserving the question, so that when his jurisdiction ceased, a party paying an illegal and excessive tariff duty could recover same back, if coerced by an erroneous view of the law.

No mention was made of a case like this, where the courts have jurisdiction to speak, not *during, but after*, the "ordinary functions of government" have been performed and the courts have a legitimate field of operation.

Most of the other cases cited by counsel (Appellees' Brief, pp. 19-34) deal with the executive or political functions of the government or with claims of a political or quasi-political nature such, as those of pensioners, soldiers, clerks of departments and the like. They all differ from this case in that, here all departmental jurisdiction has ended, so that there is no attempt to "interfere with the functions of government." This case also involves a controversy between *individuals* as to *individual* rights, presented after the

department has finally acted. The distinction is plain (Appellant's General Brief, pp. 166-170; Brief of Frank Hagerman, 31).

VI.

Defendants' fourth point (Appellees' Brief, Point Four, pp. 69-79) deals with the new question now brought into the case, i. e., that the plaintiff to recover must have had a vested right to an approval of his lease which the Secretary, by error of law, refused to recognize.

(a) The contention, as thus put, is misleading, in that it implies that plaintiff must have had some fixed *legal* right. The very purpose of the bill was to have an *equitable*, not a legal right, duly vested. If the effect of the departmental action, was, so far as was necessary to protect the Indian against his own improvidence, an approval of his lease, then plaintiff was entitled to the judgment of the courts, as to whether it was rendered valueless by an erroneous construction of a departmental rule. In plain words, the effect of the departmental action was, as stated, to approve plaintiff's lease, and it was then good as against that of defendants, provided the filing or recording laws were applicable. Since the rule, as erroneously construed, prevented the application of the filing or recording statutes, plaintiff had and could acquire no right as against defendants. If as a matter of law the Secretary was wrong then he deprived plaintiff of a right. If, however, his act had the effect, so far as it concerned the providence or improvidence of the Indian, of approving both leases, then the legal rights of the holders thereof would depend upon the priorities under the filing or recording acts. Here the plaintiff, as the

Secretary well said (Rec. 54), would have the advantage.

VII.

Defendants' fifth (Appellees' Brief, Point Five, pp. 79-105) and sixth (id. pp. 105-107) new points are that because there was, by mutual consent of both parties, an increase of the bonuses, as of the date of the leases, it conclusively appears that neither lease could have been approved.

(a) The question here is not to guess what would or would not have been done. So far as concerned protection against the improvidence of the Indian, both leases were in fact approved. The Secretary, however, gave formal approval to defendants' lease only because of his erroneous construction of a rule, which impelled him to refuse to give effect to either the *filing* or *recording* laws. But for this *erroneous* construction plaintiff's lease would have been formally approved, so the case in effect becomes that of *Johnson* v. *Towsley*, 13 Wall. 72, 87, 88, 20 L. Ed. 485, where in similar circumstances the defendants were charged as trustees.

(b) It is a misconception of the facts to say that the bonuses in both leases were increased as of dates later than those of their execution. Exactly the contrary is true. No presumption, conclusive or otherwise, can be indulged as to what the Secretary *might* or *might not* have done had there been no increase. The question is what was, in fact, *actually* done. The most that can be said is that the bonus in each lease was *by consent*, increased as of the date of *its execution*. This plainly appears from a slight review of the record.

A bonus is no part of the lease. It is exactly that which the word implies. It is a payment made of an agreed sum for the benefit of the lessor for the mere privilege of entering into the lease. Each lease, regardless of the bonus, was a formal contract, the filing or recording of which would not be affected by the approval or disapproval by the Secretary. When on March 30, plaintiff filed his lease he made (Rec., 27) a payment of $50 on account of his bonus. It was not until April 5 that defendants paid any part of their bonus. (Ex. Scales, Rec., 90-91, Affidavit of Richard, 38.) Pursuant to regular routine, on April 12, 1912, the superintendent requested the oil inspector to make an examination of these leases and report on the adequacy of the bonuses (Rec., 80). On May 16, the oil inspector reported by letter (Rec., 81-83). He, at great length, went into the facts underlying his opinion. According to the practice the superintendent wrote identical letters to the defendants and to the plaintiff (Rec., 85-86) requesting that they pay the additional amounts *suggested* by the inspector. There was in fact, some lively competition for these leases. The Eastern Oil Company was offering to pay $800 to obtain a reinstatement of its former discredited lease. So plaintiff voluntarily (Rec., 87) paid the additional bonus suggested. He had already agreed (Rec., 27) to pay $400 for his lease and the raise to $800 was not so tremendous. There was no contest of the matter by any of the parties, although the *formal* letters of the superintendent to each of them invited a contest if they cared to have one. Falling in with a simple suggestion by no means implies a confession that the lease was based on an inadequate bonus. The department specifically *fixed and applied* the bonus, *as of the date of the respective*

leases. (Rec., 83). There was no hint anywhere of giving the leases a *new* status as of the date of the payment of the increased bonus. The contention of defendants therefore that the leases must take a new status, as of a new date, is entirely fallacious.

It is said (Appellee's Brief, 91), that the permission to increase the bonus was a mere "act of grace" on the part of the department. An inspection of the record will show exactly the reverse. It may be that the oil inspector differed with the contracting parties as to the true value of the bonus. It may be that he was merely an over-zealous subordinate desirous of showing results or that it was his uniform practice to always increase a bonus. In the very nature of things there is no true criterion by which one can be fixed at an inflexible amount. After all it is a mere matter of opinion as to which the inspector may have one and the parties honestly have another. In the very nature of things it is a practical impossibility, when plaintiff contracted for a $400 bonus for his lease, for the inspector to say that it should have been $800, when he himself finds that another lease just *eight days from that time on the same property* merited only a $600 bonus. Without some definite and persuasive evidence on a proper hearing no one can say as a *conclusive* matter that plaintiff's original bonus was inadequate. The department merely put its suggestion before plaintiff and gave him an opportunity to be heard thereon. It accorded the same opportunity to the others. In view of rapidly changing conditions and the fact that there is no yardstick by which the bonus might properly be measured, it may be said that *all of them* acquiesced in the increase suggested by the oil inspector and transmitted through the superintendent. If there

was any grace extended by one party to the other it was by the lessees who readily acquiesced in the suggestion of paying, as of the date of execution, a little more bonus, thereby making no contest over views advanced by a subordinate official. The department did not assume that they were affording this opportunity as a matter of grace. That which it did was obviously to put all parties "on an equal footing" as to the matter of bonus (Rec., 121), and to have, by consent of all, the leases considered by the Secretary, with reference to their approval or disapproval, *as of the date of their respective executions*. It is obvious that the purpose was to have each lease with an added bonus stand and be considered *as of the date of its execution*. The present suggestion that it was a mere act of grace on the part of the department is afterthought which attempts to put an exactly opposite construction on acts to which all assented.

Counsel have no right to state (Appellee's Brief, p. 100) that the superintendent ever found or reported that plaintiff's bonus was inadequate. He invited a hearing on the subject. Even he *might* have been convinced that it was sufficient, if one had been had. Evidence could have been adduced. Moreover it by no means follows that even if the superintendent had been of the opinion that the bonus was inadequate, the Secretary would have adopted that view. This is all *guess*.

An artful suggestion is made (Appellee's Brief, p. 100) that *at the time plaintiff increased his bonus* he had actual and constructive notice of the defendants' lease, because he was then contesting it. This has no significance and is wholly immaterial. Plaintiff's lease should be judged as of the time when he acquired it. Likewise his *bona fides*. The department so consid-

ered it and *by consent of all*, expressly appraised the bonus as of *that* date. It was May 18, 1912, before a suggestion was made that plaintiff might raise the bonus to $800. It was June 1, when the additional amount was remitted. (Rec., 86-7). It appears from the inspector's report (Rec., 84-85) that he expressed the opinion that on April 10, 1912, a fair bonus for the lease would have been from $3,000 to $4,000. Thus in a few days the value of the bonus, in the inspector's opinion, increased about 600%. Yet this was more than a month before the superintendent even notified the defendants that they should increase their bonus to $600. (Rec., 85). To adopt counsel's *newly* discovered view would convict the department of the folly of approving the lease to the defendants in the face of the inspector's report that prior to the time they actually paid their additional bonus the lease was worth five to ten times the bonus which the department asked them to pay.

It is also contended (Appellees' Brief, 101) that on account of the inadequacy of the bonus both parties were in the same boat and the question of priority under the recording laws is entirely eliminated. This conclusion is, as already shown, built upon a false premise. It seems to be a new discovery by counsel of a thought which never below occurred to them, the department, or court. Neither the superintendent nor the Secretary thought the change of the bonus material because they discussed the legal question of priority in execution which they held controlling even as against the filing and recording laws. If they had in any wise shared the present views of counsel they would have shortly said that both leases should be disapproved because of inadequacy of bonus. The mere suggestion is

unjust to the department and a reflection upon the integrity of its officers. The folly of the contention is shown by the fact that the report by the inspector of the bonus under *both* leases was made at the *same time*. (Rec., 83.) The superintendent transmitted the suggestion based upon the inspector's report on *both* lessees on May 12, 1912. (Rec., 85-87.) If *both* leases cease to have a status as of the date of their execution and take a *new* one as of the date of the inspector's or superintendent's suggestion, or the date of payment, it was perfectly foolish for the officers to solemnly declare that as to plaintiff's lease the bonus should be $800 and as to that of defendants it should be $600. This for the *same* property on the *same* date.

VIII.

Defendants' seventh (Appellees' Brief, pp. 107-143) point, also new, is that the Secretary, on the proofs before him, should have held, and therefore this court, without issue or proofs on the subject should as a matter of law, now hold, that plaintiff took his lease with actual notice, and hence is not entitled to any benefit from the filing or recording acts.

(1) Originally the bill alleged (Rec., 2) that plaintiff took his lease *without* notice. It was then amended so as to simply recite (Rec. 12, par. 12), not that he took without notice but that the Secretary so *decided*. The defendants contented themselves with pleading (Rec. 77) that the *evidence before the Secretary* showed that plaintiff had notice. This was a very different thing from pleading that plaintiff took his lease with notice. So the case went to trial with no issue that the plaintiff took with notice.

(2) It is *now* said, as a *new* point, that there must be an affirmance here if the evidence taken *before* the Secretary, shows such notice. This is not true because (a) the superintendent said (Rec., 50) that Anicker was not delinquent and the Secretary clearly found the facts for Anicker by saying (Rec., 54) that if advantage *could* have been had by the filing "Anicker would have that advantage", (b) there was no such issue in this case, and (c) the proofs referred to did not so show.

(3) This is a subject already fully considered (Appellants' Extended Brief, 91-106; Brief of Frank Hagerman, 38-43). Suffice it to say that the presumption was against and the burden, before the department, upon defendants to prove that plaintiff actually took with notice.

(4) But as a matter of fact the most that can be said is that, if there was any evidence before the Secretary *tending* to show actual notice, it was conflicting. It is said that the Indian when executing the lease to Anicker told him that he had given a lease to Roy Scales. He really did not so say. Scales had been at one time the representative of the Eastern Oil Company (Rec., 90-91). The most that the Indian said in answer to the *leading* questions asked him, was that he told Anicker that he had leased the whole 160 acres to Scales (Rec., 100-109). His reference was to the lease of the Eastern Oil Company as plainly and distinctly testified to by E. C. Motter (Rec., 92-95), who was present at the time, taking part in the same conversation. The whole subject is fully considered in the briefs (Appellant's Extended Brief, 91-114).

IX.

It is finally contended (Appellees Brief, Point Nine, pp. 145-154) that the recording requirement of section 20 of the Act of April 26, 1906 (34 Stat. L. 145), no longer was applicable because Indian Territory had become part of Oklahoma.

(1) This question has been so fully considered (Appellants' Extended Brief, 127-135; Brief of Frank Hagerman 11-17) that nothing need be added.

(2) If, however, the creation of the state annulled this Act, it is manifest that the *filing* Act of March 1, 1907 (34 Stat. L. 1026) was always in force and that plaintiff acquired his rights prior to a compliance therewith.

Respectfully submitted,

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No. 164.

In the

Supreme Court of the United States

October Term, 1917.

WILLIAM J. ANICKER, *Appellant,*

vs.

DAVID GUNSBURG and SOUTHWESTERN PETROLEUM COMPANY, *Appellees.*

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

APPELLANT'S BRIEF.

FRANK HAGERMAN,
Solicitor for Appellant.

SMITH-GRIEVES LAW PRINTERS, KANSAS CITY, MO.

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In the

Supreme Court of the United States

October Term, 1917.

WILLIAM J. ANICKER, *Appellant*,

vs.

DAVID GUNSBURG and SOUTHWESTERN PETROLEUM COMPANY, *Appellees*.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

APPELLANT'S BRIEF.

No. 164.

APPELLANT'S STATEMENT.

1. **The appeal.**

This appeal seeks to reverse a decree of the Circuit Court of Appeals for the Eighth Circuit (141 C. C. A. 176, 226 Fed. Rep. 176; Opinion, Rec. 138), affirming one (Rec. 141) of the District

Court of the Eastern District of Oklahoma dismissing plaintiff's bill.

2. The case.

The case, as made by the bill (Rec. 7-17) and answer (Rec. 58-68), and shown by the conceded documents (Exs. A-H, Rec. 17-58, 78-122), pleaded as exhibits, is simply this: Eastman Richard, herein called the Indian, a duly enrolled full blood Creek Indian citizen, had on March 10, 1903, allotted to him the N. E. ¼ of section 5, township 17 north, range 7 east, in Creek County, Oklahoma, and received a patent therefor. He thereby became, subject to the statutory governmental control, the fee simple owner thereof. Upon March 28, 1912, he, with a full understanding of his rights and the effect of his act, in good faith, executed to plaintiff, in quintuplicate, an oil and mining lease (Ex. A, Rec. 17) on the governmental approved form, to the west half of said quarter section. The latter was on March 30, 1912, not only *filed* (Rec. 17) with the federal authorities for approval, but also *recorded* (Rec. 78) with the state register of deeds. For the lease he paid the Indian $50 cash and agreed to pay him $350 more. Upon an increase thereof (Rec. 82-83) to $800 by a legal governmental appraisement, he deposited the additional $750 with the cashier of the appropriate agency (Bill, Rec. 8; Answer, Rec. 60-61; Departmental Findings, Rec. 81-83). The Indian previously, on March 20, 1912, by an instrument in similar form (Ex. B, Rec. 29) leased this same land to defendants for a gross rental of $20, afterwards by a like appraisement (Rec.

83) increased to $600, the balance of which was likewise (*id.*) deposited. This lease defendants did not *file* with the Indian Agency until April 5, 1912, and he never *recorded* same with the register of deeds, though both state and federal statutes provided that no such *unrecorded* instrument should be good against a subsequent *bona fide* lessee for value. This the plaintiff was found to be, and was in fact. Thereafter, upon a hearing before the United States Indian Superintendent, in a cause entitled "in the matter of *conflicting* leases covering lands allotted to Eastman Richard," he (Ex. C, Rec. 42), upon the *sole* ground that defendants, absolutely and unconditionally, had, under department rule 2, thirty days after execution within which to *file* their lease, recommended the approval of same. The Commissioner of Indian Affairs, upon the *same* ground, concurred (Ex. F, Rec. 54) in the recommendation to the Secretary of the Interior. The latter, upon an original hearing (Ex. D, Rec. 51) and afterwards on an application for a rehearing (Ex. E, Rec. 53) held the facts were as stated herein, the plaintiff's lease was a proper one and plaintiff a fit lessee, who was an innocent purchaser for value, but upheld the recommendations made on the *sole* ground that the defendants had, under the rule, thirty days within which to record their lease and hence, *as a matter of law* and as against plaintiff, had the *prior* legal right. This conclusion of law was by the bill (Rec. 12, par. 12) challenged as erroneous, plaintiff seeking to charge the defendants as his trustees in possession of his land, extracting therefrom large quantities

of oil and selling same, while refusing to recognize his rights and account to him for the profits.

3. Original institution of the suit and its removal from the state court.

Appellant, as plaintiff, on January 17, 1913, instituted (Rec. 4) in the District Court of Creek County, Oklahoma, his suit against appellees, as defendants, upon whose petition (Rec. 3-6) the case was removed to the District Court below. Such jurisdiction was invoked (Original Petition, Rec. 2-3; Amended Bill, Rec. 12, par. 12) upon the *sole* ground that the bill presented, as it did, the federal question that the Secretary of the Interior, in approving a lease to defendants, and disapproving that of plaintiff, had, *solely* as a matter of law, erred in construing the federal statutes.

4. Amended bill.

On September 30, 1913, after the removal of the cause from the state court, plaintiff filed an amended bill (Rec. 7), omitting a small part of the allegations of the original, but attaching the same exhibits which had been attached to the latter. This amended bill claimed, as did the original, a recovery under a lease of the oil rights of lands which an Indian owner had executed to him, the Secretary of the Interior having, upon a hearing as to conflicting claims, by *error of law*, awarded a similar lease to defendants, who thereby became and were trustees for plaintiff, and as such refused to recognize his rights and account to him for large quantities of oil by them being extracted from the leased premises.

5. **Answer to the amended bill.**

The defendants' answer (Rec. 58) practically admitted all the facts set forth in the amended bill (Rec. 7-17). It also set forth as special and separate, though unfounded, defenses: (1) The consideration for plaintiff's lease was shown by the proceedings for an approval of the lease to be inadequate and there so found; (2) there was a failure *there* to show plaintiff to be an innocent purchaser for value; (3) the bill did not state a cause of action or show that the court had jurisdiction to annul the action of the Secretary, or power to interfere with an exercise of his discretion, but did show plaintiff's lease to be unilateral; and (4) *after* the decision of the Secretary, the Indian confirmed the lease by demanding the bonus paid and royalties accruing under defendants' lease.

6. **Plaintiff's motions to strike.**

Plaintiff separately moved (Rec. 68) to strike out, as not stating facts sufficient to constitute a defense, each of the special and separate defenses, which last two motions were sustained (Rec. 126) and the others overruled (*id*).

7. **Amendment to answer and objections thereto.**

Afterwards defendants filed (Rec. 76, 126) an amendment to the answer, setting forth (Rec. 78, 123) by exhibits, parts of the proceedings before the department, including the evidence there taken. To the filing of this amendment, plaintiff objected (Rec. 123) and moved (Rec. 124) to

strike same from the files because not a proper pleading and wholly insufficient to constitute a defense. The objection and motion were (Rec. 126, 127) overruled.

8. Stipulation.

A stipulation (Rec. 78) was then filed as a substitute for Exhibit A to the amendment to the answer. This stipulation recited that (a) the Indian executed his lease to plaintiff in quintuplicate parts, four of which were, on March 30, 1912, filed with the Indian Agent, as the bill alleged, and the fifth part, on April 1, 1912, with the Register of Deeds of Creek County, Oklahoma, though this particular fifth duplicate, so recorded, was, in fact, never submitted to the Secretary of the Interior and (b) set forth certain correspondence before the department increasing the bonus in each lease and a letter and report of the Indian Commissioner of July 18, 1912, together with all the evidence taken before him.

9. Evidence in the case.

The case was then submitted on the pleadings and exhibits, plaintiff unsuccessfully objecting (Rec. 128) to the introduction of the evidence taken before the department and appearing (Rec. 88-117) as an exhibit to the amended answer.

10. Decree and appeal.

A decree of dismissal (Rec. 129) was entered by the District Court. Upon appeal (Rec. 129, 136) to the Circuit Court of Appeals, there was

an opinion (Rec. 138; 141 C. C. A. 176, 226 Fed. Rep. 176) and a judgment (Rec. 141) of affirmance. From this result, plaintiff has again appealed (Rec. 142-148).

11. The erroneous view taken by the District Court.

The view of the District Court is indicated by its action in overruling (Rec. 125-127) the motion to strike out (Rec. 68) certain special defenses, in permitting (Rec. 126) to be filed an amendment (Rec. 76) to the answer and in admitting (Rec. 128) in evidence the testimony taken (Rec. 88-117) on the hearing before the department. That view was not that the finding there was in any respect conclusive, but was so open to the review that the actual facts governing the rights of the parties could be determined *from the evidence* there taken. This gave no force to the departmental finding and was so manifestly incorrect (*James* v. *Germania Iron Co.*, 46 C. C. A. 476, 107 Fed. Rep. 597, 610) that, without more, the only thing to be done here would be to enter a decree of reversal.

12. The Circuit Court of Appeals affirmed the action of the District Court upon the merits of the case as claimed by plaintiff.

But the Circuit Court of Appeals ignored the erroneous rulings made by the District Court and affirmed (Rec. 141-2) the decree of dismissal upon the broad ground (Rec. 138-141) that the Secretary of the Interior did not err as a matter of law, because he properly held that defendants, under departmental rule 2, had, *after* the execution of

their lease, full thirty days in which to *file* same with the department, during which period no third party could acquire an interest in the land.

13. The question in the case.

The real question here involved is simply whether the departmental rule should be construed to mean, or is valid if so construed, that a lessee of Creek Indian land has absolutely thirty days in which to file his lease, during which period no innocent third party can acquire any interest therein.

SPECIFICATIONS OF ERROR.

The specifications of error are (Rec. 130) that:

1. The District Court erred (a) in overruling (Rec. 125, 127) the motion to strike out (Rec. 68) certain special defenses; (b) in permitting (Rec. 126) to be filed an amendment (Rec. 76) to the answer; (c) in admitting (Rec. 128) in evidence the testimony taken (Rec. 88-117) in the hearing before the department, and (d) in dismissing (Rec. 128) the bill.

2. The Circuit Court of Appeals erred in affirming (Rec. 141) the action of the District Court.

3. The Circuit Court of Appeals erred (Rec. 138) in holding that the decree of the District Court was right because department rule 2 gave defendant thirty days within which to file their lease, and in the meantime prevented plaintiff, as an innocent purchaser for value, from acquiring, as against another lessee, any interest in the land.

APPELLANT'S ARGUMENT.

I.

The law required the leases to plaintiff and defendants to be filed, recorded and approved by the Secretary of the Interior. When this was done, the instrument related back to the time of its execution.

(1) Leases to Eastern Oil Company and Funk & Riter.

The departmental opinions (Rec. 42, 53, 54, 57) referred to leases made by the Indian to the Eastern Oil Company and Funk & Riter. To avoid any confusion from such references, these observations may be made: (a) Funk & Riter held (Rec. 42) a lease of the *east* half of the Indian's quarter section, which was approved by the Secretary. This has no bearing on the case, because the leases of plaintiff and defendants are not of the east, but the *west* half. (b) The Eastern Oil Company held (Rec. 42) a lease of November 29, 1911, on the entire land of the Indian. This was, in violation of the department's rule 2, without excuse, withheld from filing for more than the thirty days and was subject to other serious objections. The Indian and his other lessees protested against the approval of this lease and the Secretary disapproved the same. The Eastern Oil Company acquiesced in the result, filed no proceedings in court and was not a party to this cause.

(2) The leases to plaintiff and defendants were required to be filed, recorded and approved by the Secretary of the Interior.

(a) Section 20 of the Act of Congress of April 26, 1906 (34 Stat. L. 145) expressly provides for such *approval,* as well as the *recording,* by the provision:

> "That after the approval of this Act all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads, of full-blood allottees of the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribes shall be in writing and subject to approval of the Secretary of the Interior and shall be absolutely void and of no effect without such approval: *Provided,* That allotments of minors and incompetents may be rented or leased under order of the proper court: *Provided further,* That all leases entered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory."

Section 2 of that of May 27, 1908 (35 Stat. L. 312) also required such *approval* by providing:

> "That leases of restricted lands for oil, gas or other mining purposes * * * may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise."

The Act of March 1, 1907 (34 Stat. L. 1026) thus expressly called for the *filing* of the lease:

> "The *filing* heretofore or hereafter of any lease in the office of the United States Indian Agent, Union Agency, Muskogee, Indian Territory, shall be deemed constructive notice."

It is, therefore, certain that the leases, each of which was for more than one year, were not only subject to the *approval* of the Secretary, but also required to be *filed* in the office of the Indian Agent, as well as to be *recorded* in accordance with the general state recording statutes.

(b) The *approval* thus required (34 Stat. L. 145, Sec. 20; 35 Stat. L. 312) was, as hereinafter shown, intended solely to "protect the Indian against improvidence." Without it, the lease "created an inchoate interest in the land," which in nowise interfered with its filing or recording. (*Shulthis* v. *McDougal*, 95 C. C. A. 615, 170 Fed. Rep. 529, 536; *Pickering* v. *Lomax*, 173 U. S. 26, 43 L. Ed. 601, 602.) The *recording* called for by the Act of April 26, 1906 (34 Stat. L. 145) was not only that *then* required, but also that which might thereafter be called for by state and federal laws. The Act of February 19, 1903 (32 Stat. L. 841), *then* in existence, provided:

> "That chapter twenty-seven of the Digest of the Statutes of Arkansas, known as Mansfield's Digest of eighteen hundred and eighty-four, is hereby extended to the Indian Territory, so far as the same may be applicable and not inconsistent with any law of Congress: *Provided*, That the clerk or deputy clerk of the United States Court of each of the courts of said Territory shall be *ex officio*

> recorder for his district and perform the duties required of recorder in the chapter aforesaid, and use the seal of such court in cases requiring a seal, and keep the records of such office at the office of said clerk or deputy clerk."

That this act applied to Indians is left free of any doubt by that of April 28, 1904 (33 Stat. L. 573), which provides:

> "All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation, so as to embrace all persons and estates in said Territory, whether *Indian*, freedmen, or otherwise * * *."

These acts put in force in the Indian Territory, sections 670 and 671 of Mansfield's Digest of the Statutes of Arkansas (1884), p. 281, reading:

> "Sec. 670. Every deed, bond, or instrument of writing, *affecting the title in law or equity* to any property, real or personal, within this state, which is or may be required by law to be acknowledged, or proved and recorded, shall be constructive notice to all persons from the time the same is filed for record in the office of the recorder of the proper county; and it shall be the duty of such recorder to indorse, on every such deed, bond, or instrument, the precise time when the same is filed for record in his office.
>
> Sec. 671. No deed, bond, or instrument of writing, for the conveyance of any real estate, *or by which the title thereto may be af-*

> *fected in law or equity*, hereafter made or executed, shall be good or valid against a subsequent purchaser of such real estate for a valuable consideration, without actual notice thereof; or against any creditor of the person executing such deed, bond or instrument, obtaining a judgment or decree, which by law may be a lien upon such real estate, unless such deed, bond or instrument, duly executed and acknowledged, or approved, as is or may be required by law, shall be filed for record in the office of the clerk and *ex officio* recorder of the county where such real estate may be situated."

The broad language of these sections applies to leases (*Waskey* v. *Chambers*, 224 U. S. 564, 56 L. Ed. 885).

It is therefore certain that up to the time of the admission of Oklahoma as a state, Indian leases were within the requirement of the recording acts. So the courts fully recognize (*Shulthis* v. *McDougal*, 95 C. C. A. 615, 170 Fed. Rep. 529; *Lomax* v. *Pickering*, 173 U. S. 26, 48; 43 L. Ed. 601, 602).

(c) In 1907 the Indian Territory, wherein the land in controversy was located, became part of Oklahoma. Sections 1 and 21 of the Enabling Act (34 Stat. L. 267, 277) provided:

> "Sec. 1. That the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and the Indian Territory, as at present described, may adopt a constitution and become the State of Oklahoma, as hereinafter provided: *Provided*, That nothing contained in the said con-

stitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this Act had never been passed.

Sec. 21. * * * and all laws in force in the Territory of Oklahoma at the time of the admission of said State into the Union shall be in force throughout said State except, as modified or changed by this Act or by the constitution of the State, and the laws of the United States not locally inapplicable shall have the same force and effect within said State as elsewhere within the United States."

Section 2 of the schedule to the constitution (Snyder's Compiled Laws Oklahoma, 1909, p. 137) of the new state provided:

> "All laws in force in the Territory of Oklahoma at the time of the admission of the state into the Union, which are not repugnant to this Constitution, and which are not locally inapplicable, shall be extended to and remain in force in the State of Oklahoma until they expire by their own limitation or are altered or repealed by law."

It is plain that there was no purpose in any of these statutes to strike down the provisions for *recording* instruments affecting the title to Indian

lands. Upon the other hand, the plain purpose was to uphold the same. It will not do, therefore, to say that the requirements of section 20 of the Act of April 26, 1906 (34 Stat. L. 145) must fail because they used the words "Indian Territory." After the creation of the state, the reasonable interpretation requires the substitution for those words, the "State of Oklahoma." Otherwise Congress did a futile thing. Section 20 was enacted for the specific purpose of *protecting* Indian land titles. In creating a state out of the territory, it was intended to preserve, not destroy, such protection. Not only do sections 1 and 21 of the Enabling Act (34 Stat. L. 277, Sec. 21) expressly so provide, but *Ex parte Webb*, 225 U. S. 663, 56 L. Ed. 1248, distinctly so decides. Even if this be not true, still section 21 of the Enabling Act expressly provided that the recording laws of Oklahoma Territory should become those of the new state. This put in force section 1195 (Snyder's Compiled Laws of Oklahoma, 1909, p. 416) of the territorial law reading:

> "Except as herein provided, no acknowledgment or recording shall be necessary to the validity of any deed, mortgage, or contract relating to real estate as between the parties thereto; but no deed, mortgage, contract, bond, *lease*, or other instrument *relating to real estate*, other than a lease for a period not exceeding one year and accompanied by actual possession, shall be valid as against third persons unless acknowledged and recorded as herein provided; except actual notice to such third persons shall be equivalent to due acknowledgment and recording."

There can, therefore, be no doubt that under the laws of Oklahoma, leases of the character of those in question must be *recorded,* without waiting for the outcome of litigation over the question of approval by the Secretary of the Interior. Such was the view very properly taken in *Shulthis* v. *McDougal,* 95 C. C. A. 615, 170 Fed. Rep. 529, and is the necessary result of that which had previously been here said (*Pickering* v. *Lomax,* 145 U. S. 310, 36 L. Ed. 716; 173 U. S. 26, 48, 43 L. Ed. 601, 602). None other would seem possible, when it is remembered that the *sole* purpose of the *approval* is not to affect the rights of a lessee, but to "protect the Indian against improvidence."

The fact that constructive notice *can* be given by *filing* does not dispense with the necessity of *recording,* when there is no *filing.* In plain words, if a lessee fails to avail himself of the privilege of *filing* so as to give constructive notice, he must *record* his lease or make no claim thereto as against an innocent purchaser.

(3) To file or record the lease did not depend upon the previous approval by the Secretary, for when approved that act related back to the date of the execution of the instrument.

(a) As hereinbefore stated, the *sole* reason for the approval of the Secretary was to protect the Indian from his own improvidence. Thus, in *Pickering* v. *Lomax,* 145 U. S. 310, 36 L. Ed. 716, 719, Mr. Justice Brown said:

> "The object of the proviso was not to prevent the alienation of lands *in toto, but to protect the Indian against the improvident dis-*

> *position of his property*, and it will be presumed that the President before affixing his approval, satisfied himself that no fraud or imposition had been practiced upon the Indian when the deed was originally obtained."

In *Shulthis* v. *McDougal*, 95 C. C. A. 615, 170 Fed. Rep. 529, 536-537, it was of such a lease said:

> "While it required the approval of the Secretary of the Interior before it became in *all* respects binding, that approval was intended *solely to protect the Indian against improvidence*. When the lease was executed and delivered, *it created an inchoate interest* in the land which by the approval of the Secretary became absolute without any further act of the parties. * * * and the object of the supervisory approval of the Secretary of the Interior was simply to protect the Indian against the improvident disposition of his property."

There was nothing in any act which contemplated that a lease should not be filed or recorded *until* approved by the Secretary. If the sole purpose of that approval was to save the Indian from his own improvidence, there was no reason why the lessee, to protect himself against others, should not, forthwith, both file and record his lease. Hence, in *Shulthis* v. *McDougal*, 95 C. C. A. 615, 170 Fed. Rep. 529, it was expressly decided that under the recording acts the lease must before its approval be recorded. The language of those acts would seem to permit no other construction.

(b) If this be true as to the recording act, there is much more reason for saying the lease shall, at least, as required by the Act of March 1, 1907 (34 Stat. L. 1026) be *filed* with the Indian Commissioner. That act was passed because of and *after* the controversy in *Shulthis* v. *McDougal*, *supra*, arose. This to make it plain that the lease must be *filed*. That was the preliminary step which in practice *must* be taken before there can be an approval.

(c) When the lease is first *filed* and *recorded*, the approval of the Secretary, made *solely* for the protection of the Indian, relates back to the date of the execution of the instrument. Such was the holding of *Shulthis* v. *McDougal*, 95 C. C. A. 615, 170 Fed. Rep. 529. This was but a restatement of the doctrine repeatedly here announced (*Pickering* v. *Lomax*, 145 U. S. 310, 316, 36 L. Ed. 716; 173 U. S. 26, 43 L. Ed. 601, 602; *Lykins* v. *McGrath*, 184 U. S. 169, 170, 46 L. Ed. 485, 487; *Weyerhaeuser* v. *Hoyt*, 219 U. S. 380, 388, 55 L. Ed. 258, 262; *Turner* v. *Seep*, 167 Fed. Rep. 646, 650.)

In *Shepley* v. *Cowan*, 91 U. S. 330, 338, 23 L. Ed. 424, Mr. Justice Field thus puts the principle:

> "But whilst, according to these decisions, no vested right as against the United States is acquired until all the prerequisites for the acquisition of the title have been complied with, parties may, *as against each other*, acquire a right to be preferred in the purchase or other acquisition of the land, when the United States have determined to sell or donate the property. In all such cases, the first in time in the commencement of proceedings for the

acquisition of the title, when the same are regularly followed up, is deemed to be the first in right."

II.

Plaintiff's lease was executed March 28, 1912, filed with the Indian Commissioner on March 30, 1912, and recorded April 1, 1912. Defendants' lease, though executed March 20, 1912, was never filed till April 5, 1912, and was never at any time recorded.

(a) Defendants' lease (Ex. B, Rec. 29) was executed March 20, 1912, eight days prior to that (Ex. A, Rec. 17) of plaintiff. The latter was, as required by the Act of March 1, 1907 (34 Stat. L. 1026), on March 30, 1912, *filed* (Rec. 8, 78) in the office of the Indian Agent. On April 1, 1912, it was (*id*) *recorded* with the state register of deeds. The defendants' lease was never filed (Rec. 29) until April 5, 1912, and seems never at any time to have been recorded.

(b) If, therefore, there is to be applied the act requiring the filing or those providing for recording of such instruments, it is plain that plaintiff's lease was acquired before that of defendants was either *filed* or *recorded*.

(c) If plaintiff took his lease without notice of that of defendants, a question hereinafter (*Infra*, Div. VI) fully considered, it would seem difficult without more to uphold the views of the Secretary and his subordinates. Those views (Ex. C, Rec. 42; D, Rec. 51; E, Rec. 53; F, Rec. 57) and that

of the Circuit Court of Appeals (Rec. 138) were made to rest entirely upon the provisions of departmental rule 2, now about to be considered.

III.

The department erroneously construed its Rule 2 to permit defendants to have full thirty days within which to file their unrecorded lease and, solely because filed within that time, to require its approval as against that of plaintiff.

(1) There was, at the time of the execution of both leases, in force in the department, rule 2 (Rec. 13, 45, 138), which provided:

> "All leases shall be in quadruplicate and with the papers required shall be *filed within thirty days from and after the date of execution* by the lessor, with the United States Indian Agent at Union Agency, Muskogee, Oklahoma."

Both the department (Exs. C, D, E and F, Rec. 42, 51, 53, 54) and Circuit Court of Appeals (Opinion, Rec. 138) construed this rule to be permissive, i. e., as giving the defendants full thirty days within which to *file* their lease, and also as preventing *any* acquisition of intervening rights in the meantime. For this reason it was, though neither filed nor recorded, approved and upheld, regardless of the fact that the rights of plaintiff as an innocent purchaser had accrued.

(2) This construction was erroneous, for that the rule was at most a mere limitation upon the time

within which the lessee, *as between himself and the government*, should be required to ask for the approval of his lease. If, within that time he failed to *file* same, he, by his own act, thereby deprived himself of any right to even ask an approval. The rule was, according to its true meaning, actually applied (Ex. C, Rec. 42-47) to the Eastern Oil Company, whose lease was disapproved, because not filed within the time prescribed. It was, in fact, not simply permissive. It was no mere permission to postpone the requirement to file; it did not give, without prejudice, thirty days within which so to do. Had it been so intended, it would not have been limited to the *filing*, but would have included the *recording*, for the statute to make a lease effective, as against subsequent lessees, requires either a *filing* or *recording* or both. Upon the other hand the rule, according to its letter and spirit, is mandatory in its nature. It means that no lease is to be approved unless it is filed within thirty days. The effect of the failure to *file* or *record* is left to the provisions of the law. So construed, it answers a good purpose, is a lawful exercise of power and wholly consistent with the law. While the Act of May 27, 1908 (35 Stat. L. 312) provides for the approval by the Secretary "under rules and regulations" promulgated by him, this only means such as are *reasonable* and not in conflict or inconsistent with the law. If in anywise unreasonable, a rule must fall (*Anchor* v. *Howe*, 50 Fed. Rep. 366, 367). So, if it be inconsistent with or in conflict with the law, for it cannot add to or conflict with a statute (32 Cyc. 1006; *Morrill* v. *Jones*, 106 U. S. 466, 27 L. Ed.

267; *U. S.* v. *Symonds*, 120 U. S. 46, 49, 30 L. Ed. 557, 558; *U. S.* v. *Eaton*, 144 U. S. 677, 36 L. Ed. 591, 594; *Williamson* v. *U. S.*, 207 U. S. 425, 462, 52 L. Ed. 278, 297; *Balfour* v. *Sullivan*, 10 Saw. 104, 17 Fed. Rep. 579; *Iselin* v. *Hedden*, 28 Fed. Rep. 416, 418; *Siegred* v. *Phelps*, 14 Saw. 363, 40 Fed. Rep. 660, 661; *Anchor* v. *Howe*, 50 Fed. Rep. 366, 367; *Anglo-Cal. Bank* v. *Secretary of Treasury*, 76 Fed. Rep. 742, 749, 750, 22 C. C. A. 527; *U. S.* v. *Goodsell*, 84 Fed. Rep. 155, 156; *U. S.* v. *McMurray*, 181 Fed. Rep. 723, 730).

(3) The department evidently was not satisfied with the effect of its conclusion in the matter of these leases, nor with its own construction of its rule, for after this controversy was by it disposed of, it amended same by making it read:

> "Sec. 2. All leases shall be in quadruplicate and, with the papers required, shall be filed within thirty days from and after the date of execution by the lessor with the United States Indian Superintendent at Union Agency, Muskogee, Oklahoma.
>
> Assignments of leases and stipulations modifying the terms of existing leases shall also be filed with said superintendent within thirty days from and after the date of execution.
>
> A filing fee of $5 for each lease and each assignment, and $2 for each stipulation modifying the terms of existing contracts is hereby required, and shall accompany each lease, assignment or stipulation from and after June 1, 1913. Such fees shall be accounted for by the disbursing agent of Union Agency as miscellaneous receipts Class IV, subject to

disbursement under the regulations governing such funds.

Within twenty-four hours of the execution by an Indian lessor of an oil, gas, or other mineral lease, which requires the approval of the Secretary of the Interior, the lessee must either file in the office of the Superintendent of Union Agency or deposit in the mails addressed to said Superintendent a notice of the execution of such lease, signed by the lessee or his agent upon a form furnished with the lease blanks, showing date and hour of execution, description of land, names of parties, character of leases, etc. It is preferred that these notices be sent by registered mail. If not so sent, other proof of mailing may be required. Immediately upon receipt of such notice by the Superintendent, entry thereof will be made in the same manner as leases are indexed for the information and notice of the public. Failure to file the lease within thirty days from and after the date of execution will be considered an abandonment thereof, and the land may be leased to other parties."

The need for enacting this amendment shows the fallacy of the construction of the former rule. While this amendment does not appear in the record, it is one of those matters of which judicial notice is taken (*Caha* v. *U. S.*, 152 U. S. 211, 221, 222, 38 L. Ed. 415).

The first paragraph thereof is the rule as it existed when this controversy was before the department. The amendment was by adding the other paragraphs. If the language of the original is *permissive*, so, necessarily, is the first paragraph of the rule as amended. Yet, such a *permissive*

interpretation would now obviously conflict with the new provisions. This illustrates the manifest error in construing to be permissive a rule which is purely a mandatory limitation. As the latter, it is in harmony with the later amendment; as a permissive requirement, it absolutely conflicts therewith.

(4) The Act of March 1, 1907, requiring the lease to be *filed* (34 Stat. L. 1026) simply made the *filing* constructive notice, for without notice, either actual or constructive, no subsequent *bona fide* purchaser could be affected. This statute fixed no time for the filing. It simply made that act whenever done, the equivalent of notice. If, however, time for that purpose were implied, as it should not be, it could only, at most, be a *reasonable* period. Thirty days' delay, as required by the original rule, was unreasonable. So it has been frequently decided under statutes requiring recording within a reasonable time (*Wilson* v. *Milligan*, 75 Mo. 41; *Way* v. *Braley*, 44 Mo. App. 457; *Pond* v. *Skidmore*, 40 Conn. 213; *Camp* v. *Thacher Co.*, 75 Conn. 165, 52 Atl. Rep. 953; *Cutler* v. *Steele*, 85 Mich. 627, 48 N. W. 631; *Karst* v. *Gane*, 136 N. Y. 316, 32 N. E. Rep. 1073). The amendment to the rule shows that twenty-four hours was ample for the purpose; hence, thirty days was so unreasonable as to make the rule void (*Anchor* v. *Howe*, 50 Fed. Rep. 366, 367). This is still more clearly shown by the language of the *recording* acts (Mansfield's Arkansas Digest, 1884, secs. 670, 671; Snyder's Compiled Laws Oklahoma, 1909, p. 416) which is different from that of the act requiring *filing*. That does not per-

mit a *prior* unrecorded lease, under any circumstances, to become valid as against one *subsequent* in time, unless the latter has been taken with notice. In other words, to have *any* effect as against subsequent instruments, it must be recorded, not within a reasonable time, but *before* the later instrument is executed. That is a fixed statutory condition to its validity. In such circumstances, no delay in recording can be permitted, nor does any question of reasonableness in time arise. (*Stafford* v. *Lick*, 7 Cal. 479; *Self* v. *Sanford*, 4 Ill. App. 328, 330; *Sigourney* v. *Larned*, 10 Pick. (Mass.) 72; *Hunt* v. *Swayze*, 55 N. J. L. 33; *Drew* v. *Streeter*, 137 Mass. 460.)

So, even if the rule be construed as postponing the time for *filing*, this in nowise extended the time for *recording*. There was no attempt below to deal with the necessity of *recording*. Yet the defendants' lease, if not *recorded*, was, under the law, not valid against the plaintiff (*Shulthis* v. *McDougal*, 95 C. C. A. 615, 170 Fed. Rep. 529; *Lomax* v. *Pickering*, 173 U. S. 26, 48, 43 L. Ed. 601, 602). So, even if there was an excuse for the failure to promptly *file* the lease, which there was not, there was none for the neglect to *record* the same.

This view is not in any wise affected by the passage of the Act of March 1, 1907 (34 Stat. L. 1026), providing that *filing* with the United States Indian Agent shall be deemed constructive notice. Filing under that act, giving constructive notice, accomplishes the double purpose of *filing* and *recording*. Without it, a lease may be subject to the double danger of being both unfiled and un-

recorded, or it may only be *recorded*, in which event, constructive notice will only be inferred from the act of *recording*.

IV.

If, as here, the Secretary erred, as a matter of law, his act can be challenged by a bill of the character herein filed.

(1) Where there are two conflicting applicants for approval of a lease and the department by error of the law disapproves that of one and approves that of the other, the remedy of the unsuccessful lessee is by a bill to charge the successful party as his trustee. This principle is well settled (*Shepley* v. *Cowan*, 91 U. S. 340, 23 L. Ed. 427; *Moore* v. *Robbins*, 96 U. S. 530, 96 U. S. 539, 24 L. Ed. 851; *Hawley* v. *Diller*, 178 U. S. 476, 490, 44 L. Ed. 1157, 1162, 1175; *Frellsen* v. *Crandell*, 217 U. S. 71, 78, 54 L. Ed. 670, 674; *Johnson* v. *Towsley*, 13 Wall. 72, 91, 20 L. Ed. 483; *Southern Pacific R. Co.* v. *Dull*, 22 Fed. Rep. 489, 500; *Bogan* v. *Mortgage Co.*, 63 Fed. Rep. 193, 195, 11 C. C. A. 128; *Germania Iron Co.* v. *James*, 89 Fed. Rep. 811, 816-17, 818, 32 C. C. A. 348, 354, 355; *James* v. *Germania Iron Co.*, 107 Fed. Rep. 597, 601, 46 C. C. A. 476, 479; *Wallace* v. *Adams*, 143 Fed. Rep. 716, 721, 74 C. C. A. 540; *Garrett* v. *Walcott*, 25 Okla. 582, 106 Pac. Rep. 848, 851; *Ross* v. *Stewart*, 25 Okla. 617, 106 Pac. Rep. 870, 872; *Leak* v. *Joslyn*, 20 Okla. 200, 94 Pac. Rep. 518, 520; *Robinson* v. *Owen*, 30 Okla.

484, 119 Pac. Rep. 995, 999; *Summers* v. *Barks*, 36 Okla. 337, 127 Pac. Rep. 402).

Johnson v. *Towsley*, 13 Wall. 87, 88, 20 L. Ed. 485, after declaring such to be the rule, thus applied it to this situation:

> "The Secretary, or rather the assistant secretary as appears by the record, rejected Towsley's claim on the sole ground that he had previously filed a declaratory statement of his intention to claim a preemption of another tract of land, which he had voluntarily abandoned; and it is clear that *but for this construction of the statute on that subject*, Towsley would have received the patent which was awarded to Johnson."

This language may be here thus paraphrased:

The Secretary rejected plaintiff's lease "on the *sole* ground" that a departmental rule gave defendants thirty days in which to file their lease, during which time plaintiff could acquire no interest. It is clear but for this construction of the law on that subject, he "would have received the" lease "which was awarded to" defendants.

As to this claim of the right to so charge defendants as trustees, the court below (Rec. 139) said:

> "We think this contention is unsound for two reasons: First, whatever may be the effect of the registry provisions in regard to these inchoate leases prior to their approval by the Secretary of the Interior, that effect is confined to imparting notice to parties dealing with the property, and has no bearing whatever upon the discretion which the law grants

to the Secretary of the Interior in his guardianship over the Indians. Second, because the rule invoked by plaintiff that a patent for public lands issued through a clear mistake of law or fact, will be held to create a trust in favor of the party justly entitled to the land, has no proper application to the approval of gas and oil leases by the Secretary of the Interior. That is so because there are no acts specified in any law by the doing of which any person can acquire a legal right to the approval of such a lease."

This begs the whole question. The fundamental vice therein is that, as hereinafter shown (*infra*, Div. V), the Secretary here actually exercised his discretion by finding that *both* leases were in all respects satisfactory in form, properly secured and executed by proper lessees. Each was required to and did make a deposit of a substantially *increased* bonus. Everything was decided which was necessary to a complete technical approval of each lease. The only reason for not *calling* it an actual approval of plaintiff's was the mistaken notion that the law gave defendants thirty days in which to file theirs, and during that period plaintiff was, as against him, incapacitated from acquiring any right.

(2) The department's findings of fact are unquestionably binding upon the parties. A bill in equity can, however, as that here does, question the judgment of the Secretary upon a pure question of law, or one outside of his domain. If he erred in the application of the law or decided something of which he had no jurisdiction, his

conclusion is subject to review. His power was simply one of approval. He could approve, but neither make nor enter into negotiations for a lease (*Midland Oil Co.* v. *Turner*, 179 Fed. Rep. 74, 76, 102 C. C. A. 368). While the power to approve includes the *duty* to determine all matters embraced in its exercise (*Weyerhaeuser* v. *Hoyt*, 219 U. S. 388, 390, 55 L. Ed. 261, 3; *Wisconsin Central R. Co.* v. *Price Co.*, 133 U. S. 496, 33 L. Ed. 687, 694), yet this does permit the assumption of jurisdiction over questions not committed to the judgment of the department (*id.*; *St. P. & S. R. Co.* v. *Winona, Etc., R. Co.*, 112 U. S. 720, 28 L. Ed. 872), nor make *conclusive* an erroneous determination of a question of law. So it has been repeatedly held that when a commission or department by error of law wrongfully determines a question or erroneously assumes jurisdiction, the right to appeal to the courts unquestionably exists (*Wallace* v. *Adams*, 143 Fed. Rep. 716, 721, 74 C. C. A. 540, 204 U. S. 415, 426, 51 L. Ed. 547, 553; *James* v. *Germania Iron Co.*, 46 C. C. A. 476, 479, 107 Fed. Rep. 597, 600; *Hawley* v. *Diller*, 178 U. S. 476, 44 L. Ed. 1157, 1162; *Calhoun* v. *Violett*, 173 U. S. 60, 61, 43 L. Ed. 614, 615; *Johnson* v. *Drew*, 171 U. S. 93, 99, 100, 43 L. Ed. 88, 71; *Sanford* v. *Sanford*, 139 U. S. 642, 647, 35 L. Ed. 290, 291.) The principle has been (*Robinson* v. *Owen*, 30 Okla. 484, 119 Pac. Rep. 994, 999) recognized as applicable to such a body as the Commission to the Five Civilized Tribes. The *reasons* for approval or disapproval may be wholly immaterial (*U. S.* v. *Hitch-*

cock, 205 U. S. 85, 86, 51 L. Ed. 721), in a case where the question is wholly political in its nature (*id.*), for there is a plain distinction between property (*Wallace* v. *Adams*, 143 Fed. Rep. 716, 725, 74 C. C. A. 540) and political rights (*Stephens* v. *Cherokee Nation*, 174 U. S. 445, 488, 43 L. Ed. 1041, 1056; *Red Bird* v. *U. S.*, 203 U. S. 76, 51 L. Ed. 97), the courts having no control over the political question as, for instance, leasing of tribal lands (*Cherokee Nation* v. *Hitchcock*, 187 U. S. 295, 47 L. Ed. 184). This because Congress has the whole and paramount power to handle tribal property (*id.*). But *after* the tribal relations cease, and individual ownership is vested, then the determination of all property rights rests upon the exercise of the judicial power (*Wallace* v. *Adams*, 143 Fed. Rep. 716, 721, 74 C. C. A. 540, 204 U. S. 415, 426, 51 L. Ed. 547, 553; *Ballinger* v. *U. S.*, 216 U. S. 240, 249, 54 L. Ed. 468). Here the sole function of departmental approval was "to protect the Indian against improvidence." (*Shulthis* v. *McDougal*, 170 Fed. Rep. 529, 536, 95 C. C. A. 615; *Pickering* v. *Lomax*, 145 U. S. 310, 36 L. Ed. 716). In determining whether the department erred in a matter of law "the pleadings, orders, opinions and judgments may be examined so as to ascertain" what issues were raised, litigated and decided in the contest (*James* v. *Germania Iron Co.*, 107 Fed. Rep. 610, 46 C. C. A. 476, 479), but the *testimony* offered cannot, as was done (Rec. 128) by the District Court, be considered to determine what finding of facts should have been made.

V.

The Secretary found every fact necessary for an approval, so that if his construction and application of Rule 2 was, as a matter of law, erroneous, the effect of his finding was to approve plaintiff's lease.

(a) Simply because the Secretary did not, in express words, say "I approve the Anicker lease" is not conclusive. There can be an approval in an informal way, even a writing not always being necessary (*U. S. Bank* v. *Dandridge*, 12 Wheat. 64, 90, 6 L. Ed. 552, 561). It remains then to examine the proceedings in the department to see whether plaintiff's lease was not, in effect, actually approved (*Johnson* v. *Towsley*, 13 Wall. 87, 88, 20 L. Ed. 485), if the view entertained as to the effect of Rule 2 was erroneous.

(b) The sole purpose of the approval was to protect the Indian against improvidence (*Shulthis* v. *McDougal*, 95 C. C. A. 615, 170 Fed. Rep. 529; *Pickering* v. *Lomax*, 145 U. S. 316, 36 L. Ed. 716; *Moore* v. *Sawyer*, 167 Fed. Rep. 826, 834), not to decide legal rights between conflicting claimants. Therefore, the question really is, whether the department practically approved plaintiff's lease to the extent necessary to "protect the Indian against the improvident disposition of his property." Each lease (Exs. A and B, Rec. 17, 29) was upon exactly the same governmental form. The applications (Rec. 24, 35), affidavits of the Indian and lessee (Rec. 26, 37), claimant's financial standing and references (Rec. 24, 35) and the bonds (Rec.

27, 40) for performance of the lessee's obligations were practically the same. The original bonus offered by plaintiff (Rec. 26) was $400, of which $50 was (Rec. 26) paid in cash; that offered by defendants (Rec. 38) was but $80, of which $20 was (Rec. 39) paid. This was a substantial difference in favor of plaintiff. The department found no fault with either lease or lessee, save and except as to the bonus. Thereafter it fixed the appraised value of plaintiff's lease at $800 and that of defendants at $600, the difference against plaintiff being accounted for (Rec. 84) on account of an alleged *increase* in value from March 20th to March 28th, the respective dates of the leases. This in and of itself was a sufficient approval of each lease, so far as concerned the protection of the Indian against improvidence, which was (*Shulthis* v. *McDougal*, 95 C. C. A. 615, 170 Fed. Rep. 315, 36 L. Ed. 716; *Moore* v. *Sawyer*, 167 Fed. Rep. 826, 834) all that the Secretary was called upon to do.

(c) A question of *priority* then arose solely *as between the respective lessees*. This the Secretary assumed to decide. He then decided it erroneously. The decision was against the Indian's interest because upon account of the larger bonus his interest was really with the plaintiff. The question was solely one of law. The department on its papers so indicated by entitling (Rec. 42) the proceeding "in the matter of *conflicting leases* covering land allotted to Eastman Richard." The Indian Agency, in transmitting the papers, endorsed (Rec. 23) upon the lease these words:

> "The within lease is forwarded to the Commissioner of Indian affairs with recommendation that it be disapproved. See my report of even date."

This indicated that it was only disapproved upon the grounds stated in the report (Ex. C, Rec. 42) which accompanied the document. These reasons had nothing whatsoever to do with the protection of the Indian. They pertained alone to a governing rule of law.

(d) Turning, then, to the reports and opinions of the department, they should be read, as the records were in *Johnson* v. *Towsley*, 13 Wall. 87, 88, 20 L. Ed. 485, in the light of the maxim *expressio unius est exclusio alterius* (Broom, Legal Maxims, 505), the meaning (*American Well-Works* v. *Rivers*, 36 Fed. Rep. 880, 881) of which is:

> "If there be several things of the same class or kind, the expression of one or more of them implies the exclusion of all not expressed; and this, even if the law would have implied all if none had been enumerated."

This maxim is almost of daily application (*Thomas* v. *Wynne*, 122 Fed. Rep. 395, 400; *In re Herzikopf*, 121 Fed. Rep. 544, 546; *In re The Annie Faxon*, 66 Fed. Rep. 575, 581; *Wood* v. *U. S.*, 16 Peters 342, 364, 10 L. Ed. 987; *Kendall* v. *U. S.*, 12 Peters 524, 650, 651, 9 L. Ed. 1181; *R. R. Co.* v. *Howard*, 13 How. 307, 340, 14 L. Ed. 157; *Snavely* v. *Buggy Co.*, 36 Kans. 106, 111, 12

Pac. Rep. 522; *Olmstead* v. *Benefit Society*, 37 Kans. 93, 97, 14 Pac. Rep. 449).

The departmental records show an erroneous legal opinion to have been the *sole* ground on which the defendants' lease was approved and that of plaintiff disapproved. This excludes the idea of any other objection. The opinions leave no doubt upon the subject. The Indian Agency in its report of July 22, 1912 (Rec. 47, 50), said:

> "The lease in favor of David Gunsburg and Southwestern Petroleum Company is dated March 20, 1912, and filed April 5, 1912, while the lease to W. J. Anicker bears date of March 28, 1912, and was filed March 30, 1912. The department has uniformly held in such cases that where a lease is filed, with the papers necessary for completion of same, within thirty days, that the date of execution is the date from which the priority of the lease is determined. * * *
>
> The lease of Mr. Anicker must also be disapproved *not because he was in any way delinquent himself, but because of the prior lease of David Gunsburg and Southwestern Petroleum Company filed with all papers required within even a shorter period than that allowed by the department.*"

In his letter of August 26, 1912, transmitting leases for approval, the Assistant Commissioner (Rec. 56) said:

> "It has been the understanding of this office that the date of the lease, if filed with the Superintendent at Union Agency within the

thirty-day period governs instead of the date of filing and it is not the understanding of the office that leases must be filed in the county in which the land is located in order to give notice to a third party before the approval by the Secretary of the Interior."

On September 24, 1912, the First Assistant Secretary of the Interior (Rec. 52) said:

> "The Anicker lease, executed March 28, was filed March 30; the Gunsburg lease, executed March 20, was filed April 5. The rule of practice is that among competing leases, duly filed in compliance with the rule, the lease first executed shall be accepted, i. e., the date of execution governs. Anicker contends that the date of filing ought to govern. * * *
>
> The lengthy discussions * * * in the briefs does not convince me that the recognized *rule* of the department should be changed, or should be waived in this case. It has been long established and is well understood. It is suited to the conditions in which the oil and gas leasing business is carried on. In very many cases, a considerable time is required after the signature of a lessor is obtained, for the execution by the lessee, the making of the bond and other papers. The Secretary, in the exercise of the power vested in him by law, has given thirty days for this purpose. The only inconvenience which may follow the enforcement of the rule, is where some enterprising person, in keen competition to secure a promising piece of land, induces the allottee to execute a lease to him, after he has already leased it to another; and having filed his lease at the agency, is subsequently

informed that the lease executed prior to his has been duly filed and takes precedence. For these reasons the lease to W. J. Anicker (No. 22568) has been disapproved.' * * *"

In the final opinion (Rec. 54) of the Secretary of December 9, 1912, it was stated:

"If there were any advantage in the prior filing of a lease, which was entered into and executed after another lease, both having been filed at the Agency within the time required by regulation, Anicker would have that advantage. The Act of March 1, 1907 (32 Stat. 1026), makes the filing at Union Agency legal notice."

Again in the first part of that opinion it (Rec. 53) was stated:

"By letter of September 24, 1912, you were informed of the disposal of several leases of Eastman Richard, a full blood Creek, upon his allotment of 160 acres. Two of said leases covered same land, one having been given to Gunsburg and the Southwestern Petroleum Company, the other to W. J. Anicker. *The former was approved on the ground of priority of execution, though the latter was filed first at Union Agency.* Both were filed at the Agency within thirty days from their execution as required by rule."

Defendants below claimed that this latter opinion (Rec. 51-53), being on an unsuccessful application for a rehearing, should not be considered

because the Secretary had no power to grant one. The reasoning to support such a contention is too refined to be followed. Departmental control is never ended till a motion for review is decided (*Cox* v. *Garrett*, 7 Okla. 384, 54 Pac. Rep. 546, 549; *Cope* v. *Braden*, 11 Okla. 291, 67 Pac. Rep. 475, 476; *Smith* v. *Finger*, 15 Okla. 129, 79 Pac. Rep. 759, 762). Moreover, a department has a right to entertain a motion for a rehearing and thereon to reverse itself (*Love* v. *Flahive*, 205 U. S. 195, 51 L. Ed. 768; *U. S. ex rel. Knight* v. *Lane*, 228 U. S. 56, 57 L. Ed. 709; 32 Cyc. 1019). If such a motion be filed it may be denied upon a supplemental opinion modifying that of the original (11 Cyc. 762; *Lester's Appeal*, 11 Atl. 387; *Adams* v. *R. Co.*, 77 Miss. 194, 24 So. Rep. 300, 317, 28 So. Rep. 956; *U. S. ex rel. Lower* v. *Fisher*, 223 U. S. 93, 100, 101, 56 L. Ed. 364, 368). Regardless of a rehearing or lapse of time, there is power to supplement that which has been stated in an original opinion (*Houston* v. *Williams*, 13 Cal. 24, per Field, J.).

VI.

Plaintiff was an innocent purchaser. But whether he was or not, his rights as such and as against another lessee could not be determined by the Secretary.

(1) As already shown, the approval of the Secretary was for the *sole* purpose of protecting the Indian against improvidence. (*Shulthis* v. *McDougal*, 95 C. C. A. 615, 170 Fed. Rep. 529; *Pick-*

cring v. *Lomax*, 145 U. S. 310, 36 L. Ed. 716; *Moore* v. *Sawyer*, 167 Fed. Rep. 826, 834). It had nothing to do with the conflicting rights of lessees (*id*). Therefore, the question as to whether plaintiff was, as against the defendants, an innocent lessee, was for the courts and not for the Secretary to *conclusively* decide. He had no right to entitle a controversy as one of *"conflicting leases,"* and then proceed to erroneously decide the question of law which had arisen between the lessees. This was not protecting an Indian against his improvidence. It was assuming jurisdiction to *conclusively* decide, as between conflicting lessees, the application of the *filing* and *recording laws*.

(2) The department assumed that it had the right to decide whether plaintiff took his lease without notice, and then rested its decision, *solely* upon another ground. This was necessarily a decision against defendants upon the question whether plaintiff was an innocent purchaser (*Johnson* v. *Towsley*, 13 Wall. 87, 88, 20 L. Ed. 485). It did more than this by holding (Rec. 53) that if prior *filing* or *recording* was of any value, "Anicker would have that advantage." This was a decision for Anicker of everything, except the question of law.

(3) Every intendment is taken to favor the rights of a *bona fide* purchaser (*Van Ness* v. *U. S. Bank*, 13 Pet. 17, 10 L. Ed. 38; *U. S.* v. *C. & O. L. Co.*, 148 U. S. 30, 37 L. Ed. 359), which the plaintiff was. Mere rumor or suspicion or general notice of a sale will not justify (*Stanley* v. *Schwalby*, 162 U. S. 276, 40 L. Ed. 967) a find-

ing against him. When a vendor presents a title *prima facie* sufficient, the vendee may, without investigation, rely thereon.

A junior purchaser whose deed is first recorded is presumptively a *bona fide* purchaser for value without notice, and the burden of proof to the contrary rests on the senior purchaser, whose deed has not been recorded (*Gratz* v. *Land & R. I. Co.*, 82 Fed. 381, 27 C. C. A. 305; certiorari denied, 173 U. S. 705, 43 L. Ed. 1186; *In re Ducker*, 134 Fed. Rep. 43, 50, 67 C. C. A. 117; *Stout* v. *The Richard J. Carney*, 53 Fed. Rep. 927, 4 C. C. A. 111; *White* v. *McGarry*, 47 Fed. Rep. 420).

While some states hold that one claiming to be a *bona fide* purchaser without notice of a prior conflicting conveyance must show it as an affirmative defense (39 Cyc. 1782; *Rozell* v. *Chicago, etc., Co.*, 76 Ark. 525, 89 S. W. Rep. 469; *Mer. Trust Co.* v. *Chicago, etc., Co.*, 123 Fed. Rep. 343, 395, 59 C. C. A. 349), yet, when he shows that he was a purchaser for value, the burden shifts to the other to show that the purchaser had notice (39 Cyc. 1782; *Manchester* v. *Goeswich*, 95 Ark. 582, 130 S. W. Rep. 526; *Osceola Land Co.* v. *Chicago, etc., Co.*, 84 Ark. 1, 103 S. W. Rep. 609; *Walter* v. *Brown*, 115 Ia. 360, 88 N. W. Rep. 832; *Hodges* v. *Winston*, 94 Ala. 576, 10 So. Rep. 535; *Barton* v. *Barton*, 75 Ala. 400; *Anthony* v. *Wheeler*, 130 Ill. 128, 22 N. E. Rep. 494; *Kruse* v. *Conklin*, 82 Kan. 358, 108 Pac. Rep. 856).

The actual payment of $50 and binding himself to pay several hundred dollars more is certainly a valuable consideration, especially as the prior un-

recorded lease of defendants was for a bonus of only $80 (Rec. 81), of which only $20 was (Rec. 39) paid.

(4) In the first opinion (Rec. 52) the Secretary expressed some doubt as to whether proof had been made before him of the recording of *plaintiff's* lease. He subsequently corrected (Rec. 54) this misapprehension. This, so far as concerned the department, was wholly immaterial, because plaintiff's rights, as a subsequent purchaser, attached when he obtained his lease, not when he recorded same. Recording laws are for protection against *subsequent* purchasers. They need not be complied with by one who actually purchases, as a condition to asserting his prior claim. However, to avoid any possible misapprehension of the facts, it may be stated that the plaintiff's lease (Rec. 17) was dated March 28, 1912, filed (Rec. 17) on March 30, and a duplicate copy *recorded* (Rec. 78) on April 1. A filing of such a duplicate is of the same effect as if it had been an original. The additional or fifth executed lease was properly recorded, even though a fifth or extra *original* copy (*Mitchell* v. *U. S.*, 9 Pet. 711, 732, 9 L. Ed. 283; *McPhaul* v. *Lapsley*, 20 Wall. 264, 22 L. Ed. 344; *Herndon* v. *Casiano*, 7 Tex. 322, 331; *Blythe* v. *Houston*, 46 Tex. 65, 77; *Titus* v. *Kimbro*, 8 Tex. 210). Duplicate contracts are treated as originals (*Crane* v. *Partland*, 9 Mich. 493; *Jones* v. *Hoard*, 59 Ark. 42, 26 S. W. Rep. 193; *Mo. Pac. R. R.* v. *Herdenheimer*, 82 Tex. 200, 17 S. W. Rep. 608). Even as evidence, such additional executed lease is treated as an original, to the end that secondary evidence is admissible until both

original and duplicates are accounted for (17 Cyc. 482; *A. G. S. R. Co.* v. *Mt. Vernon Co.*, 84 Ala. 173, 4 So. 356; *Peaks* v. *Cobb*, 192 Mass. 196, 77 N. E. Rep. 881). While the recording of a copy merely is not authorized, the filing of the original and transcribing from a compared copy is sufficient (*Central Tr. Co.* v. *Ga. Pac. Ry. Co.*, 83 Fed. Rep. 386). While no ruling on that point was appealed from, there is a reported case of an appeal sustaining rights predicated on such recording (*Central Tr. Co.* v. *Ga. Pac. Ry. Co.*, 30 C. C. A. 648, 87 Fed. Rep. 288). It is held that separate mortgages on lands in different counties, by and to the same parties, to secure the same debt, are separate transactions (*McDonald* v. *Bank*, 106 Ia. 517, 76 N. W. Rep. 1011), and that a mortgage on a railway running through several counties may have precedence in one county and be postponed to other intermediate lines through delay in recording in other counties (*Ludlow* v. *Clinton Line R.*, 15 Fed. Cases 1099, No. 8600). To obviate this difficulty, there has been developed the modern practice in railroad cases of executing numerous original mortgages of same tenor covering the entire property and sending one copy to each place for record simultaneously. Each is an original and so treated and each expresses the entire contract.

(5) There is nothing in the record to justify a holding that plaintiff took with notice. The only evidence is that offered on the hearing (Rec. 88-113) before the department. That cannot be considered here (*James* v. *Germania Iron*

Co., 46 C. C. A. 476, 479, 107 Fed. Rep. 597, 610). But if it were to be considered as original evidence offered on a trial of this case, it is wholly insufficient. A mere reading thereof (Ev. Motter, Rec. 92-95; Richard, Rec. 106-109; Scales, Rec. 90-91; affidavits of Richard, Rec. 26, 115-117) will so show. This will not be discussed in detail because the question is not here now. The *burden* was on defendants and upon the trial below they made *no* showing on the subject. The Secretary impliedly held plaintiff to be an innocent purchaser, remarking (Rec. 54) that if prior recording were a factor "Anicker would have that advantage."

Respectfully submitted,

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